

# Can Pornography Cause Rape?

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## Introduction

When Seventh Circuit Judge Easterbrook ruled against the constitutionality of the Dworkin-MacKinnon pornography ordinance in Indianapolis, his judgment was not entirely negative. Near the end of the decision, he suggests that the section of the ordinance that creates "remedies for injuries and assaults attributable to pornography is salvageable in principle."<sup>1</sup> The limitation placed on such remedies, according to the ordinance, is that the injuries or assaults were "directly caused by specific pornography."<sup>2</sup> In Easterbrook's view, "it is not beyond the realm of possibility that a state court could construe this limitation in a way that would make the statute constitutional."<sup>3</sup> In other words, Easterbrook accepted that in theory, it is possible that pornography can cause rape, at least in the sense that those responsible for the pornography could be held liable for the injuries resulting from the assault. He is skeptical of this possibility, for, as he says, the "constitutional requirements for a valid recovery for assault caused by speech might turn out to be too rigorous for any plaintiff to meet,"<sup>4</sup> nevertheless, he admits that it is a possibility. In this article, I intend (a) to defend Judge Easterbrook's suggestion that pornography can cause sexual assault, and (b) to allay his skepticism that a plaintiff could meet the rigorous constitutional requirements for recovery.

I divide my article into two parts. In part I, I discuss the causal claim. In what sense of "cause" is it true that pornography can cause rape? This is important not only because this claim has often been denied, but also because the specific nature of the causal connection is important to clarify in order to show that it is a legitimate basis for recovery. In part II, I address constitutional concerns. I argue that in virtue of the way in which pornography can cause rape, pornography can count as "incitement" to rape. I specify what standards of proof a plaintiff should be required to meet in order to respect the First Amendment concerns that might be thought to apply to pornography.

## I. Pornography as a Cause of Sexual Assault

### 1. *The Nature of Causal Connections*

In 1989 I attended a public lecture by Susie Bright, a proponent of erotica for women. One main point of the lecture was to defend pornography against recent attacks by, among others, Catharine MacKinnon. One of the

central claims Bright discussed was whether or not pornography causes rape. She characterized the view that it does cause rape as the view that “the devil made him do it.” In her view, if we accept that pornography causes rape, then we are letting the rapist off the hook because if we say that the pornography caused the rape, then we cannot also say that it was the rapist who caused the rape.

The assumption here seems to be that a causal connection is a connection between two events or things. Let us call the pornography *E*, the rapist *F*, and the rape *G*. Here we have two rivals for the unique position as “the cause of *G*.” If we say that *F* caused *G*, we thereby exonerate *E* as the cause of *G*; likewise, if we say that *E* caused *G*, we thereby exonerate *F* as the cause.

This view of causality is strongly suggested by the scientific method. Built into the experimental method is the necessity for “controls.” Imagine a study to test whether or not a certain substance can reduce the pain of headaches. A number of volunteers with headaches may be given pills to take, but not all of them will be the test substance. Some of the pills will be placebos. This is important because if the volunteers find that their headaches are less painful after taking the pills, we want to be able to say that the pain reduction was a result of the experimental substance and not a result of the “placebo effect.”

This view of causality also suggests what Hempel called the “covering-law” model for causal explanation: “[C]orresponding general laws are always presupposed by an explanatory statement to the effect that a particular event of a certain kind *G* (e.g., expansion of a gas under constant pressure; flow of a current in a wire loop) was *caused* by an event of another kind *F* (e.g., heating of the gas; motion of the loop across a magnetic field). To see this, we need not enter into the complex ramifications of the notion of cause; it suffices to note that the general maxim ‘Same cause, same effect,’ when applied to such explanatory statements, yields the implied claim that whenever an event of kind *F* occurs, it is accompanied by an event of kind *G*.<sup>5</sup> The placebo effect presents a problem for the “same cause, same effect” principle. It can falsely lead you to believe that the test substance is having the desired effect in every case, when in fact it is having the desired result in only a few cases. To test the causal power of a particular *F*, you need to narrow in on only those effects that *F* by itself causes, not the effects it can have in conjunction with a number of other factors. That is why test subjects are often screened for various physical conditions prior to testing: to narrow in on only those effects that *F* by itself causes, scientists must weed out all the extra causal factors that could obscure *F*’s causal power.

This narrowing of focus is a kind of abstraction, and that is part of the reason why Hempel thinks that causal claims are necessarily general claims. When we abstract from all the different particular conditions that can obscure *F*’s unique causal power, we are left with pure *F* by itself, or *F* in general (as opposed to *F* in particular, perhaps even unique, circumstances). According to Hempel, to specify the cause of a given effect, we must specify two general classes that are correlated with one another such that from a member of the first, a member of the second may be inferred. To say that

taking the aspirin cured my headache is implicitly to claim that in general, whenever someone takes aspirin, it will cure his headache.

But of course this example shows the most obvious limitation of this theory of causality. "That aspirin cured my headache" may be true, whereas "whenever someone takes aspirin, it cures his headache" is clearly false. The fact that this covering law is false doesn't at all undermine the particular claim about my headache. This is where the narrowing of focus comes in. "Whenever someone takes aspirin, it cures his headache" is to be understood only in the abstract and narrow sense: "once we have controlled for all other factors, whenever someone takes aspirin, it cures his headache." This may very well be true, but it threatens to make the covering-law model vacuous. This new covering law seems to amount to this: "whenever someone susceptible to the power of aspirin takes a dosage sufficient to cure his headache, it cures his headache." Obviously this is no help.

It is worth pausing to notice an application of this model to pornography. If causal claims require covering laws, then we can rig a covering law to show that pornography does cause rape: "whenever someone who is susceptible to the power of pornography consumes enough pornography to cause him to rape a woman, he rapes a woman." Why are there cases where a man consumes pornography and yet fails to rape a woman? The same reason why some people consume aspirin and fail to have their headaches cured: they haven't consumed a dosage sufficient for their system. Some people have a higher tolerance for aspirin than others, and some people have a higher tolerance for pornography than others.

More important than the general, philosophical problems with this model of causality is the fact that it fits very poorly with legal practice. Consider this example. Because of Mr. Duncan's negligence, his cart has broken down on the street, and it happens to be near a plate glass window. Mr. Duncan's driver tries to fix the cart, and enlists the help of a bystander. The bystander helps to dislodge a blanket that is stuck between the seat and the sweep of the cart, accidentally causing part of the cart to smash the plate glass window, injuring Mr. Hollidge, who just happened to be window shopping nearby.<sup>6</sup> If we follow Hempel and say that "corresponding general laws are always presupposed by an explanatory statement," then probably we have to explain the injury to Mr. Hollidge by the breaking of the window, and attribute his injury to the bystander's negligence. Events of the type "breaking windows near people" are often accompanied by events of the type "people getting cut by flying glass." No such covering law seems reasonable in the case of Mr. Duncan's negligence. Events of the type "negligently permitting a cart to fall into disrepair" are not often accompanied by events of the type "people getting cut by flying glass." However, in this case, Mr. Duncan was found liable for Mr. Hollidge's injuries. Of course we could always rig the descriptions of the general kinds of events to get the desired result (e.g., events of the type "negligence with dangerous machines" may very well often be accompanied by events of the type "people getting injured"), but that counts more against this theory of causality than in its favor, since one can always rig the descriptions of events to get the result one antecedently desires.<sup>7</sup> In deciding who caused Mr. Hollidge's

injuries, a jury must focus on the particulars of the case at hand, even if those particulars are fairly unique and not obviously susceptible to a covering-law analysis. The narrowness of focus that is entirely appropriate in a controlled laboratory experiment is often inappropriate in an uncontrolled series of events in the real world.<sup>8</sup>

I don't claim to have refuted Hempel's covering-law model of causality.<sup>9</sup> All I have done is to sketch part of an argument that suggests that although this model may be useful for some scientific purposes, its usefulness is limited. For a different model of causality, consider this famous example given by Collingwood: "[A] car skids while cornering at a certain point, strikes the kerb [*sic*], and turns turtle. From the car-driver's point of view the cause of the accident was cornering too fast, and the lesson is that one must drive more carefully. From the county surveyor's point of view, the cause was a defect in the surface or camber of the road, and the lesson is that greater care must be taken to make roads skid-proof. From the motor-manufacturer's point of view, the cause was defective design in the car, and the lesson is that one must place the centre of gravity lower."<sup>10</sup> According to Collingwood, "the cause of an event in nature is the handle, so to speak, by which human beings can manipulate it."<sup>11</sup> We might call this the "handle theory of causality." Alternatively, we might follow Gasking and call this the "recipe theory of causality." On Gasking's view, a statement of the cause of something is very like the statement of a recipe for producing it.<sup>12</sup> In the above example, a car with a high center of gravity, plus a poorly designed road, plus a speeding driver is a recipe for disaster. Or to put emphasis on prevention, there are several different causes of the accident, since there are several different parts of the recipe, any one of which, if removed, might have prevented the accident from happening.

Notice that this recipe theory significantly changes some of our expectations. If we have something like the covering-law model in mind, then we may have a tendency to ask of Collingwood's accident case, "Who was *the real cause* of the accident?" The more culpable the driver was by speeding, the less culpable are the county surveyor and the motor manufacturer. If causal responsibility is like a pie, then the more you assign to one factor, the less there is left over to assign to another factor.

Collingwood rejects this idea. He imagines one person (A) causing another (B) to do something ( $\beta$ ), and he gives this analysis of the situation: "Nevertheless, in this case A is said to 'share the responsibility' for the act  $\beta$ . This does not imply that a responsibility is a divisible thing, which would be absurd; it means that, whereas B is responsible for the act  $\beta$ , A is responsible for his own act,  $\alpha$ , viz. the act of pointing out certain facts to B or urging upon him certain expediciencies, whereby he induces him to commit the act  $\beta$ . When a child accused of a misdeed rounds on its accuser, saying, 'You made me do it,' he is not excusing himself, he is implicating his accuser as an accessory. This is what Adam was doing when he said, 'The woman whom thou gavest to be with me, she gave me of the tree, and I did eat.'"<sup>13</sup> Causal responsibility is not the sort of thing that gets divided up amongst the causally relevant contributing factors, as a pie may be divided amongst guests. Or, to use a different metaphor from Robert Nozick, responsibility "is not a

bucket in which less remains when some is apportioned out.”<sup>14</sup> Causal responsibility is more like a dye that bleeds through things and stains whatever is connected to it. Causal responsibility grows when causally relevant factors increase. If the driver was going too fast, and the road was negligently made, and the car was negligently designed, then they all may be implicated in, and hence responsible for, the accident. The driver should have been going slower, and so is causally responsible for the speed, which contributed to the accident; the road should have been laid better, and so the county surveyor is causally responsible for the camber of the road, which contributed to the accident; the car should have had a lower center of gravity, and so the designer is causally responsible for the tipping of the car, which contributed to the accident.

I pointed out above that the covering-law model fits poorly with legal practice, but quite the reverse is true here: the recipe model of causality fits quite well with legal practice. What I have in mind here is the doctrine of the joint and several liability of concurrent tortfeasors. As Wright has recently put it, when two defendants are held jointly and severally liable for negligently injuring the plaintiff, neither defendant is “merely ‘50% negligent’ or ‘50% responsible.’” Such statements make as much sense as saying that someone is ‘50% pregnant.’ Nor did either defendant’s negligence cause or occasion only 50% of the plaintiff’s injury. Rather, each defendant was 100% negligent, each defendant’s negligence was an actual and proximate cause of 100% of the injury, and each defendant therefore is fully responsible for the entire injury.”<sup>15</sup> The drive to find narrowly focused covering laws that precisely identify what is and what is not the cause of a specific kind of event would lead us to reject joint and several liability and instead opt for only proportionate several liability. As O’Neil has recently argued in favor of proportionate several liability, “[a]lthough it may seem unjust to leave a plaintiff uncompensated for the entire loss, it may be equally unfair to require a defendant who caused a small portion of those damages to pay them in their entirety.”<sup>16</sup> So far, however, this argument has not won the day.<sup>17</sup> When several distinct individuals are concurrently responsible for an injury, we don’t try to slice the responsibility up into precise bits depending upon the precise nature of what each individual did. Causal responsibility works by someone’s or something’s being implicated in a set of causal factors that produce a result, not by narrowly tailored distinctions of the precise role this one ingredient played in the recipe.<sup>18</sup>

The moral of the story is that proper prudence requires circumspection. You must pay attention not only to what you are doing, but also to the context in which you are doing it. Your small negligence may be the final ingredient in a recipe for a big disaster. If you don’t want to be held liable for an injury in which you feel you played only a minor part, then you need to exercise due prudence and circumspection in your actions: your actions don’t occur in a vacuum, and your negligence may very well contribute to an injury far beyond what you may have originally imagined possible, thinking of your actions in a narrow, Hempelian way.

This leads to the main problem with this recipe theory of causality. As Collingwood himself points out, “the conditions of any given event are

quite possibly infinite in number.”<sup>19</sup> If we accept this theory of causal responsibility, then it may turn out that everyone is responsible for everything. Surely that is an unworkable theory of causality. But the answer to this worry has already been given: if causes are “handles,” then the only salient causes are the ones that we can actually do something about. At some point, assigning causal responsibility is a very practical matter.<sup>20</sup> We can’t expect designers to design cars that are safe even for the most reckless of drivers. At some point we just have to say “although the design of the car was a factor in the accident, we really shouldn’t try to prevent accidents by requiring car designers to go that far in making cars accident resistant.”

Here again we see the limitations of the covering-law model. Even if there are true, general claims of the form “all *F*s are accompanied by *G*s,” often they will not help us make these difficult decisions about which “handles” we should try to pull and which we should leave alone. These difficult decisions will involve, to some degree, “policy concerns” such as precedent or tradition, common sense, and an ordinary sense of fairness or justice.

What I hope to have shown in this section is that when it comes to identifying the cause of an injury, we are not limited to a notion of cause that is best suited to laboratory experiments. Certainly much that scientists discover will be invaluable to juries, but assigning causal responsibility for injuries in actual, particular cases will often involve considerations and interests very different from those of scientists determining causes under controlled laboratory conditions.

## *2. Pornography as an Exculpatory Cause of Rape*

Return to the kind of causality with which I began section 1. The law does recognize “devil made him do it” sorts of causes in which “*F* is the cause of *G*” rules out *E* as the cause of *G*. Pauline Stafford looks at a piece of mail from her medical insurance company and sees that in the box titled “Diagnosis or Nature of Illness or Injury,” the hospital has written “brain tumor.” Not long thereafter, she commits suicide. It turns out that she didn’t have a brain tumor, and the hospital staff knew she didn’t have a brain tumor, but they wrote it down anyway because they’d had trouble in the past getting paid by the insurance company when they had tried to write a “rule out diagnosis” in that box. This presented a jury question as to who was to blame for the death of Mrs. Stafford: the hospital, or Mrs. Stafford herself. If writing “brain tumor” in the relevant box was found to be such a shock to her, then the hospital, and not Mrs. Stafford herself, was the cause of her death. In effect, the hospital made her kill herself.<sup>21</sup> In rare circumstances, a suicide may be found to be an “accidental death”<sup>22</sup> caused not by the person who commits the act, but by whoever caused the unfortunate person to have an “irresistible impulse”<sup>23</sup> or an “uncontrollable impulse”<sup>24</sup> to commit suicide. The impulse needn’t be sudden; it may take weeks or even months before it results in suicide.<sup>25</sup> Normally these cases involve an appeal to (temporary) insanity, but one extraordinary case involved two recovering heroin addicts whose addiction allegedly left them incapable of



resisting an impulse to drink a fluid used in the workshop that contained methyl alcohol.<sup>26</sup>

If writing the phrase “brain tumor” can make someone commit suicide, mightn’t pornography make someone commit rape?<sup>27</sup> Many sex offenders consume much pornography, and some even claim that the pornography played a causal role in at least some of their sexual assaults.<sup>28</sup> Erotically charged images or descriptions may act as triggers for sexual violence in unbalanced people, especially if those unbalanced people have been victims of sexual violence in the past.<sup>29</sup> However, if our goal is to decrease the amount of sexual violence in our society, perhaps we should focus more attention on stopping child sexual abuse, and on therapy for the survivors of child sexual abuse, than on stopping pornography.

Furthermore, there is something unjust in attacking this problem by restricting pornography. Theoretically, anything can trigger dangerous behavior in an unbalanced or “mentally fragile” man.<sup>30</sup> If a boy is lured into a van by the offer of a Snickers bar, and is then brutally raped, it is possible that the smell of a Snickers bar later in life will trigger violent behavior. If the man is unbalanced, he needs help, and the thing that triggered his irrational behavior is not really to blame, even if it plays a causal role in his action.<sup>31</sup>

There are other exculpatory causes. For example, if I physically overpower you and throw you onto Al’s leg, breaking it, then I am the real cause of Al’s broken leg, even though, in some sense, you were the one who broke it. The impact of your body was the closest cause preceding the breaking of the leg, but in such a case we clearly wouldn’t hold you responsible. My causal role in the incident takes away the guilt you would have had if the impact of your body on Al’s leg had been a result simply of your own vicious or negligent choice.

In addition, there are ways in which normal, balanced people can be psychologically overwhelmed. In negligence law people raise the hypothetical “squib in the marketplace” example. If Al sets off a firecracker in a crowded marketplace and startles Betty, causing her to knock over someone’s apple cart, then Betty is not responsible for the apple vendor’s loss, Al is. Sudden shock or fear can overwhelm even a psychologically balanced person, and so if Al is responsible for Betty’s sudden violent emotion, then Al is an exculpatory cause of Betty’s knocking over the apple cart. Betty is not guilty, because Al made her do it.<sup>32</sup>

But this is about the extent of exculpatory causes when we are talking about adults.<sup>33</sup> If Al causes anger, disgust, fear, greed, or desire in Betty that is not so overwhelming that it causes temporary insanity, then when Betty acts on those emotions, she is responsible for what she does. We might refer to these emotions as a kind of “mental intermediation”<sup>34</sup> between whatever stimulated them and whatever acts Betty does as a result of them. If Al says “Boo!” in a marketplace and Betty overreacts and starts throwing apples at Al, then Betty is responsible for her own actions. The mental intermediation constitutes an intervening cause that disrupts the causal chain begun by Al’s action and makes Betty responsible for her actions.

We are more generous with exculpatory causes when it comes to children. For example, if Al tosses candy to children in the street who then scramble around to get the candy and knock someone over, then Al may be an exculpatory cause of the children's role in the person's injuries. Such a case came to the Supreme Court of Utah in 1925. In the court's opinion, Judge Gideon explained part of his reasoning as follows: "The acts of the boys were not those of fully grown responsible men. On the contrary, the boys were of that thoughtless age that, while engaged in the pursuit of pleasure, they paid little heed to their surroundings or what might result to others who happened to be in the way of the object sought."<sup>35</sup> Boys will be boys. We hold children less responsible than we would hold adults. If I threw candy in the street and several adults ran after it, knocking down someone in the process, no judge would be quite so lenient.

In the case before Judge Gideon, agents of Keeley Ice Cream Company were tossing candy from a float in a parade down a public street, some boys were chasing after it, and in their haste they injured Mrs. Shafer. According to Gideon, the boys were rushing to get the candy because they were "attracted" by it.<sup>36</sup> He later concludes that "the acts of defendant in throwing the candy put the boys in action." The defendant's actions stimulated certain desires in the boys that "attracted" them to move in the direction of the thrown candy. This attraction was so strong that it overwhelmed any thoughts of caution they may have had. It is almost as if the defendant had picked up the children and thrown them onto poor Mrs. Shafer's leg. Of course the children were not overwhelmed physically, they were overwhelmed emotionally. Notice that this too is a kind of "mental intermediation." However, this kind of "mental intermediation" does not constitute an intervening cause; it does not disrupt the causal chain from the tossing of the candy to the injuries to Mrs. Shafer. The intermediate stages of the causal chain were mental events (e.g., desires), but that doesn't negate the fact that they were simply more links in the chain. Hence, Keeley Ice Cream Company was responsible, legally and financially, for Mrs. Shafer's injuries. The children were not really the ones to blame; Keeley Ice Cream Company made them do it.

So far I have identified four different types of exculpatory causes:

1. Psychologically overwhelming an unbalanced man's ability to control his own actions.
2. Psychologically overwhelming a boy's ability to control his own actions.
3. Psychologically overwhelming a normal man's ability to control his own actions.
4. Physically overwhelming a man's ability to control his own actions.

It is not hard to imagine how pornography could be an exculpatory cause of rape in ways 1 or 2. Pornography might trigger antisocial behavior in boys and in unbalanced men, but the only legal restrictions this causal power could justify would be measures to keep pornography away from minors.<sup>37</sup> It is harder to see how pornography could be an exculpatory cause in ways 3 or 4. It is not clear how pornography could act like the "squib in the



marketplace," nor is it clear how a piece of pornography could physically overwhelm anyone. A part of maturing into normal adulthood is taking responsibility for one's sexual drives. Regardless of what lustful thoughts or desires one may have, acting on those thoughts or desires is a very different thing. If the only sort of cause recognized by law were an exculpatory cause, then probably the only legal action that the causal power of pornography could justify would be to enact restrictions on the access of minors to pornography.

### 3. Pornography as a Nonexculpatory Cause

The law recognizes that some causes are nonexculpatory. To understand how a cause can fail to exculpate, consider again the candy-throwing example. Why is Keeley Ice Cream Company held responsible for the injuries to Mrs. Shafer when the boys were the direct causes of those injuries? As Keeley pointed out in its appeal, in a negligence case the court must look for the "proximate cause" of injury. In this case, aren't the boys the clear "proximate cause" of injury, and isn't Keeley clearly a remote cause? Judge Gideon explained his view by quoting the decision of the U.S. Supreme Court in *Milwaukee, etc., Ry. Co. v. Kellogg*:

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement or as in the oft-cited case of the squib thrown in the market place. 2 B. Rep. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.<sup>38</sup>

If Al attaches a chain to Betty's television, pulls the chain and breaks the television, he can't avoid responsibility by claiming that it was really the chain that broke the television. This is no less true if Al is responsible for stimulating children to run around the house, who then accidentally break the television.

Notice that this is so even when adults and not children are the intermediate causes, and when the adults in question are normal, balanced

individuals behaving reasonably. In *Weisman v. Robinson Clay Products*, a truck driver named Weisman snapped off some wooden lath from a load he was to carry so that it wouldn't exceed the legal height limit, a splinter hit his eye, and he sued the company who loaded the truck improperly. Judge Doyle affirmed the jury's finding that the company, not Mr. Weisman, was responsible for the injury. Here is part of Doyle's opinion in this case: "It is the defendant's claim that the improperly loaded trailer created a "static condition" that in no way endangered the plaintiff. We are of the opinion, however, and so rule, that where a defendant whose duty it is to prepare a load of clay pipe on a trailer for safe interstate carriage, negligently fails to do so, and this negligent conduct creates the stimulus for an act of a plaintiff in an attempt to make the load safe for transport, and which act causes injury, there is no break in the chain of events which would prevent the negligent defendant's liability, even though the negligent conduct of the defendant had created a 'static condition' only."<sup>39</sup> RCP's negligent action was a "stimulus" for Weisman's action, which then caused injury. It is not that Weisman was an unbalanced man who was often triggered to break up wooden fencing, rather, he was a balanced man who took foreseeable steps to correct a problem caused by the negligence of RCP. Notice also that there is "mental intermediation" here. Weisman saw what a poor job RCP had done at loading the trailer, and he processed this information together with his understanding of the law and his desire to obey the law, and he decided upon a course of action.

Here the mental intermediation was perfectly foreseeable and was not an intervening cause shielding RCP from responsibility. The mental intermediation was just another link in the causal chain set in motion by RCP. RCP is a cause of Weisman's injuries, which exculpates Weisman's actions. The court held RCP and not Mr. Weisman liable for the damage. This extends exculpatory causes beyond cases involving physical or emotional coercion, children, and unbalanced men. Even if there is no physical or emotional coercion, and even if the person in question is a normal, balanced adult, and even if there is "mental intermediation," there can still be a cause of his action that exculpates him.

The point of legally recognizing such a cause is to extend legally required caution when our actions affect others. Of course we must avoid causing direct harm to others, and we must also avoid coercing others physically or psychologically to harm others. But *Weisman* shows that in addition to all this, we must also avoid being the "stimulus" for others (either children or adults) to harm someone.

At this point, one might try to draw an analogy between the "stimulation" of Weisman's action and the action of a rapist "stimulated" to rape a woman by pornography. However, such an analogy is only tenuous at best. There are two glaring disanalogies: (a) the pornography allegedly "stimulates" a criminal act, whereas RCP's act "stimulated" a noncriminal act; and (b) unlike RCP's "stimulation," pornography raises First Amendment considerations. I deal with the first disanalogy here, and with the second disanalogy below.

By recognizing that an exculpatory “proximate cause” may operate through intermediate agents, the law raises a very dangerous possibility. If the children can escape blame by pointing to Keeley Ice Cream Company, and if Weisman can escape blame by pointing to RCP, then why can’t criminals escape blame by pointing to whatever “stimulated” them to commit the crimes they committed? By parity of reasoning, won’t the courts be forced to let many criminals off the hook?

The courts can easily avoid this danger simply by drawing the line at criminal behavior. If you “stimulate” injurious noncriminal behavior, then you are to blame; if you “stimulate” injurious criminal behavior, then the criminal is to blame, not you. The trouble with this approach is that it seems precisely the wrong way to respond to the problem. If our law requires us to exercise caution when we might “stimulate” legal but dangerous action, then why should it require absolutely no caution at all when it comes to “stimulating” illegal action? If the law is going to require caution when we might “stimulate” action, shouldn’t it require more caution and not less when the actions we might “stimulate” are so bad as to be illegal?

In effect, our law raises the possibility of a terrible dilemma. On the one hand, if our law requires caution when we might “stimulate” someone else to act, then it risks exculpating criminals. On the other hand, if we want to hold criminals responsible for their own actions, it seems that we must not recognize exculpatory causes that act through intermediate agents. Unfortunately this would seem seriously to reduce the degree of caution our law requires of us.

The middle ground the law takes to avoid both extremes is to recognize that there can be nonexculpatory causes. On the one hand, our law maintains the requirement that we take care not to “stimulate” dangerous acts, but on the other hand it avoids letting criminals off the hook by accepting that when it comes to criminal acts, “stimulation” is no longer an exculpatory cause.

As an example, consider *Loeser v. Nathan Hale Gardens, Inc.* Because of the negligence of Nathan Hale Gardens, Inc. (NHG), a parking lot was unlit at night for many weeks. One night Fred Loeser was attacked in the parking lot, and he sued NHG. Here is a part of Justice Sandler’s opinion in the case:

As to whether a criminal event of the kind that occurred here was foreseeable, the evidence presented a jury question. The testimony persuasively documenting the relationship between violent criminal acts and the absence of lighting in an outside environment is emphatically confirmed by common experience.

Of course criminal acts frequently occur in daylight or in lighted premises. When, however, a criminal undertakes to commit a violent crime at night, it is at least a reasonable inference that he has been influenced in his choice of the time by the cover afforded by darkness and that the presence or absence of lighting would be a significant consideration in his determining where and under what circumstances to commit the intended crime.<sup>40</sup>

The darkness that resulted from NHG's negligence "influenced" the assailants. In Sandler's view, this presented a jury question as to whether this influence was significant enough to hold NHG partly responsible for the attack on Mr. Loeser.

There is no question of exculpating the assailants. No doubt if the assailants could have been caught they would have been tried for assault. The legal point is that even if they were caught, convicted, and punished, that would be irrelevant to what would happen to NGH. The suit against NGH is based on its causal contribution to the attack on Mr. Loeser.

A causally similar situation was considered in *Atamian v. Supermarkets Gen. Corp.*,<sup>41</sup> in which a supermarket was found liable to a patron who was raped in the parking lot because of the dim lighting of the lot. The court found that the supermarket did not provide reasonable security measures after five previous assaults on patrons in that lot. See also *Delaney v. University of Houston*,<sup>42</sup> which presented a jury question as to whether the university was responsible for the rape of Andrea Delaney because it had failed to repair outer locks on her dormitory. In these cases, as in *Loeser*, we have one agent who causally contributes to an assault on someone (in two of the cases, the assaults were sexual in nature) by providing some stimulus for the criminal activity of a third person. In *Loeser* and *Atamian*, the darkness was a stimulus for the criminals and in *Delaney*, the absence of locks was a stimulus to the criminal. NHG, the supermarket, and the university did not make the criminals do what they did, but their negligence contributed causally to the crime. Surely a number of potential criminals passed by each situation and were not stimulated to criminal action, but that does not prove that the criminals who eventually did take advantage of the situation were not stimulated to their acts partly by the negligence of NHG, the supermarket, or the university. It was foreseeable that someone might very well come along who would find their negligence just stimulating enough to commit a crime; some people have a lower tolerance than others for conditions conducive to criminal assault.

Notice that these are precisely the sorts of cases that don't fit a covering-law model of causality. An event of the type "leaving the premises dark" is not reliably associated with events of the type "violent criminal activity on the premises." Quite often there is no violent criminal activity on unlit premises, and quite often there is violent criminal activity on well-lit premises. In Hempel's sense of cause, NGH's actions were causally irrelevant to what happened to Mr. Loeser.

So much the worse for Hempel's sense of cause. This is exactly the sort of case where something like the recipe theory of causality is clearly more reasonable. NGH failed to exercise due circumspection. In a narrow, scientific sense, controlling for other particular, and perhaps unique, causal factors, failing to light the parking lot properly might lead to little more than people fumbling in the dark for their keys. However, a moment's reflection on the broader social circumstances should have led NGH to realize that it was not in a scientifically controlled situation, and that it was contributing substantially to a very dangerous situation, which could result in a violent robbery or worse. The assailants' central role in producing Mr. Loeser's

injuries doesn't negate the contributing role of NGH's negligence. Both were salient parts of the recipe for the assault that the law can fruitfully address. Causal responsibility for the attack is not like a bucket of water in which less remains when some is dished out.

What I want to argue is that some kinds of pornography (which I will identify later) can play a similar role in some sexual assaults. Pornography can produce intense sexual arousal and intense sexual desire not simply for an orgasm (perhaps through masturbation), but also for sexual contact with another person. Here is how one rapist described it: "I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was. The pain on their faces. The thrill, the excitement."<sup>43</sup> If the pornographic material focuses this arousal and desire in the direction of illegal sexual contact, such as rape, then it can be a "stimulus" to a normal, balanced adult to commit rape. It is true that not everyone who is exposed to such material will rape someone, but it is just as true that not everyone who is exposed to an unlit parking lot will assault someone. It is true that there is "mental intermediation" in stimulating a man to rape a woman, but it is just as true that there is "mental intermediation" in stimulating someone to break off wood fencing to make the load he must drive legal. If we apply the same standards to pornography that we apply to other cases of causality, then it is clear that pornography can indeed cause rape. Or, to put the same point in other words, people who accept the ordinary sense of "cause" in nonpornographic cases, but deny that pornography can cause rape, are implicitly relying upon an unfair double standard: they use ordinary standards when they accept that NHG caused the assault on Mr. Loeser, but then they suddenly elevate the criteria for finding a causal connection when it comes to pornography and rape. In nonpornographic cases they don't require overwhelming scientific research in support of the claim that, for example, leaving a parking lot dark has a high statistical correlation with people getting violently assaulted; but in cases involving pornography they do require overwhelming scientific research in support of the claim that, for example, exposure to pornography has a high statistical correlation with people getting raped. Perhaps pornography is subject to greater protection than leaving a parking lot dark, if pornography is protected by the First Amendment, but protection by the First Amendment is irrelevant to the fact that pornography can cause rape.

Outside of First Amendment considerations (which I address in part II), in cases where pornography causes rape, the rapist should be held accountable for his crime, and the pornographers should be held responsible for putting out the material that "stimulated" the attack, just as NHG was guilty of negligently "stimulating" the unknown assailants to assault Fred Loeser.<sup>44</sup> This would not be a question of letting the rapist off the hook by blaming pornography instead of the rapist. This would not be "the devil made him do it" causation. The point of holding pornographers liable for the injuries they "stimulate" others to cause is to require due circumspection from those who produce and distribute erotically charged

material. You can't leave your parking lot dark at night as a potential and indiscriminate stimulus to any one passing by, because, although many of the passersby will conduct themselves prudently, there may very well come along one person who will make the wrong decision and act on the indiscriminate stimulus. One bad person can ruin something for the rest of us. The same is true with pornography. You can't indiscriminately put out material that produces intense sexual arousal and desire for illegal sexual contact, because, although many members of the audience will conduct themselves prudently, there may very well come along one person who will make the wrong decision and act on the indiscriminately distributed stimulus. A moment's reflection on the broader social circumstances should lead publishers to realize that their material is not distributed in a scientifically controlled environment, where only the legally upright will get it. One bad person can ruin what is for others a harmless fantasy.

In a narrow sense of causality, abstracting from particular, and perhaps unique, circumstances, the only thing erotically charged material causes is sexual arousal. But a moment's reflection on broader social circumstances should lead people to realize that certain kinds of material may very well be contributing substantially to very dangerous situations that could result in violent sexual assaults or worse.<sup>45</sup> Some erotically charged material can be a highly salient ingredient in a recipe for serious injury, and this ingredient is one that the law can fruitfully address.

## II. Pornography as Incitement to Sexual Assault

### 4. *The Nature of Incitement*

So far I have argued that pornography can stimulate sexual assault in a way relevantly similar to the way in which NHG's negligently leaving its parking lot dark stimulated the assault on Mr. Loeser. An important disanalogy is that NHG's negligence doesn't raise any First Amendment issues, whereas pornography does. A pornographic novel, for example, is a linguistic item, and as such it would seem to fall under the protection of the "freedom of speech" clause. However, the First Amendment is not an absolute protection of all expressive activity. There are a number of categories of speech that the First Amendment does not protect: for example, obscenity, defamation, "fighting words," and incitement to criminal action. The latter two categories involve expressive activities that (tend to) provoke or cause dangerous or illegal action. It is the second of these two categories I wish to focus upon. I want to argue that the way in which some kinds of pornography can stimulate sexual assault amounts to incitement to criminal action, and hence, the kind of material I have in mind is not protected by the First Amendment. I discuss incitement in general in this section, and will apply incitement principles to pornography in particular in the remaining sections.

The incitement exception to First Amendment protection has its roots in the "clear and present danger" test articulated by Holmes in three criminal cases arising from the Espionage Act of 1917: *Schenck v. U.S.*, *Frohwerk v.*



U.S., and *Debs v. U.S.* He clarifies this test in a dissenting opinion that same year in a case arising from the same act in *Abrams v. U.S.*<sup>46</sup> The central image in *Schenck* was that of a person falsely shouting "Fire!" in a crowded theater and causing a panic. Holmes further explains as follows:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The Statute of 1917, in §4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.<sup>47</sup>

In the final sentence of the above quotation, Holmes invites us to distinguish three things: (a) the act itself, (b) the tendency of the act (given the circumstances), and (c) the intent with which the act is done. He says that if (a), (b), and (c) are all "the same," then the court need not wait around for the agent to succeed in his evil intent. Having all three be "the same" is, in Holmes's view, sufficient for state action, but he doesn't tell us what his view would be if one of the three were not "the same."<sup>48</sup> Consider these three defective crowded-theater cases:

1. The Unintentional Inciter, as a joke, falsely shouts "Fire!" unintentionally causing a panic.
2. The Inept Inciter falsely shouts "Fire!" intending to cause a panic, but the shout is so poorly executed that everyone takes it as a joke.
3. The Crafty Inciter falsely whispers "I smell something funny" to someone he knows is a severe pyrophobe, and just as foreseen and intended, the pyrophobe screams "Fire!" and causes a general panic.

In each of these three cases, the act, the tendency, and the intent are not all "the same." With the Unintentional Inciter, the act and the tendency of the act are the same, that is, they are all in the category of "pose a clear and present danger," but the intention is different. With the Inept Inciter, the act and the intention are the same, that is, they are in the proscribed category, but the tendency (because of its poor execution) is different. With the Crafty Inciter, the act is not in the proscribed category, but the tendency (given the circumstances) and the intention are.

The main difference in these cases centers on intent. The Inept Inciter and the Crafty Inciter both intend the bad consequences, whereas the Unintentional Inciter does not. Depending upon the circumstances, this could

provide an extra shield against prosecution to the Unintentional Inciter. However, even the Unintentional Inciter may be subject to civil action by those who are injured.<sup>49</sup>

In his dissenting opinion in *Abrams*, Holmes shows that on the “clear and present danger” test as he understands it, the Crafty Inciter and the Inept Inciter would not be protected by the First Amendment. He refers to a very different case, *Swift & Co. v. U.S.*,<sup>50</sup> in which a dominant proportion of independent meat dealers coordinated their legal activities (e.g., how much they chose to bid on various lots of cattle) in such a way as to regulate prices and so on, in effect monopolizing meat commerce in the United States. Although their individual actions were perfectly legal, they were carried out with the intention of creating monopolistic control over the market. Abiding by the letter of the law won’t shield you from prosecution, if you design your otherwise legal acts in such a way as to have a cumulative, illegal effect. Holmes goes even further in *Frohwerk*, in which he says that “a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent.”<sup>51</sup> Here the mere intention to work together to obstruct the recruitment of soldiers for the war is punishable as conspiracy. This would be true if no means, legal or illegal, have been chosen and also if the means that have been chosen are ill suited to the purpose, or if they are poorly executed so that the purpose will not actually be achieved. The fact that people are intentionally trying to break the law by itself presents a danger.<sup>52</sup> This is true even if the evidence of the intention to work together for this purpose consists in nothing more than criticism of the government, that is, political speech.

Holmes is on solid legal ground here. In *U.S. v. Peoni* Judge Hand succinctly describes the relevant history, going all the way back to English law in the fourteenth century. He quotes Bracton as saying that “he sufficiently kills who advises [the killing]” and Coke, who includes those who “command” a killing, where “commanding” includes those who “incite, set on or stir up [others to the deed].”<sup>53</sup> No matter how crafty or inept the incitement, the criminal intent is sufficient to implicate the inciter in the resulting violation or harm, even if the incitement consisted in nothing other than speech, and even if the violation or harm is not directly the result of anything the inciter himself does, but something others do as a result of the incitement.

The danger this raises in Holmes’s view is that it threatens to gut the First Amendment of all its protective force: “I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the freedom of speech.’”<sup>54</sup> If intent alone, proven by speech alone, were enough to justify government action, then in theory, Congress could establish a special committee to investigate the publications of various organizations to see which of them express any intent to violate the laws of the land, or to impede or overthrow the government. In effect, as Justice Black said in a loyalty oath case in 1961, liberty in this country would be “dependent upon the efficiency of the Government’s informers.”<sup>55</sup>

Holmes saw the threat of this, and even in *Schenck* he tried to forestall it. I identify two things he did to tighten up his "clear and present danger test." First, Holmes tried to make sure that the sort of intent that must be proven is both clear and specific: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point."<sup>56</sup> Holmes takes two separate steps here. He (a) claims that the document was intended not merely to express an opinion or to convey information, but that whatever else it was intended to do, it was intended "to have some effect." Then he (b) looks to see what different effects it could have been intended to have, and he finds only one. (He doesn't tell us how he would have proceeded if he had found two possible intentions, and if one of them were more plausibly attributed to *Schenck* than the other.) These two steps ensure that only speech that is clearly focused on specific dangerous or illegal action provides a basis for criminal prosecution.

This shows why Holmes is perfectly correct in dissenting from the *Abrams* decision. The leaflets in question in *Abrams* are similar in many respects to the leaflets and speeches in the previous three cases, but there is a crucial difference: in *Schenck*, *Frohwerk*, and *Debs* there is language specifically directed at conscription, while in *Abrams* none of the language is specifically addressed to obstructing conscription or any other specific law. The closest it comes is this: "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."<sup>57</sup> While this does pick out specific activities, and it may even be interpreted as intending to cause people to quit their jobs at ammunition factories, the act of quitting your job is not illegal. On the contrary, refusing to show up for conscription is illegal. Of course the former may lead to the crippling or hindering of the war effort, but notice that this is one step removed from direct violation of the law.<sup>58</sup>

However, I must avoid giving a misleading impression. Although the speech in question in *Schenck*, *Frohwerk*, and *Debs* included language directed specifically at conscription, none of it is what we would ordinarily think of as explicitly intentional language. None of it included any direct, explicit exhortation to particular individuals to obstruct the draft. What Holmes does find, e.g., in *Schenck*, are very negative characterizations of the draft (e.g., "a conscript is little better than a convict") and vague exhortations (e.g., affirming a "right to assert your opposition to the draft," and "do not submit to intimidation").<sup>59</sup> Holmes's interpretation is not unreasonable: if a document assumes that there are only two alternatives (e.g., (1) showing up for conscription and (2) not showing up for conscription), and it characterizes one in a very negative fashion, whereas it characterizes the other in a very positive fashion, it is reasonable to assume that the one responsible for the document is trying to influence the audience away from the first and toward the second alternative.

This is the first thing Holmes did to prevent his “clear and present danger” test from gutting the First Amendment: the danger must be “clear” from the speech in question. The second thing he did was to clarify what he meant by “present.” In *Abrams* he says that the danger has to be “imminent” and be produced “forthwith.”<sup>60</sup> However, in *Frohwerk* he used very different language: “But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.”<sup>61</sup> In retrospect, Holmes should not have used the analogy of blowing on a flame to kindle it, he should have used the analogy of striking a match in a room filled with gas. The causal connection he has in mind is immediate and direct, not delayed through a number of intermediate steps that may or may not occur. The proscribable language must clearly be directed at an immediate “evil” and not at some effect which, though innocent in itself, could eventually lead to problems at some unspecified point in the future.

Holmes clearly regretted and feared this misinterpretation of the “clear and present danger” test in *Abrams* (see especially the final sentence of his dissent on page 631, where he almost comes right out and apologizes to the defendants for the miscarriage of justice in their case). But this was just a taste of things to come. In *Gitlow v. People of the State of New York*,<sup>62</sup> the court upheld Benjamin Gitlow’s conviction for “criminal anarchy” on the basis of a pamphlet he wrote entitled *The Left Wing Manifesto* and a newspaper he published and distributed called *The Revolutionary Age*. Although the court accepted that there was “no evidence of any effect resulting from the publication and circulation of the Manifesto,”<sup>63</sup> his advocacy of “revolutionary” and “left wing” political ideas was considered dangerous enough that it was unprotected by the First Amendment. Justice Sanford’s reasoning harkens back to Holmes’s metaphor in *Frohwerk* of kindling a flame: “That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. . . . And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.”<sup>64</sup> The state doesn’t have to wait around to see which revolutionary sparks do and which do not flare up into destructive conflagrations; it has the right to make preemptive strikes while the sparks are still small, weak, and vulnerable. Simply forming or joining an organization whose political views involve advocating a violent overthrow of the government could subject one to criminal prosecution, even if it is so small and impotent that there is virtually no chance that it would disturb the public order in the near future. The mere fact that such a group exists, and that it may, over time, persuade people of the correctness of its views, thereby leading

eventually to a serious attempt to overthrow the government, would be enough to warrant immediate police intervention.<sup>65</sup>

In order to combat this loosening of First Amendment protection, Brandeis (joined by Holmes) suggested an extra consideration: "Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."<sup>66</sup> This suggestion was adopted by the Court in *American Communications Association v. Douds* and in *Dennis v. U.S.*<sup>67</sup> Mere advocacy of dangerous or illegal actions would not be enough to justify police intervention.<sup>68</sup> The Court put the "clear and present" back into the "clear and present danger test."

This was underscored in *Yates v. U.S.* and in *Noto v. U.S.*<sup>69</sup> In *Noto*, the court distinguished "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" from "preparing a group for violent action and steeling it to such action."<sup>70</sup> To "steel" someone to violent action is to make them hard like steel so that they don't soften or weaken in the face of the terrible things to be done. "Steeling" someone is very different from informing them, or debating with them or trying to convince them of something. If you stop at the level of "abstract" reasoning and logic, you leave the degree of "hardness" up to the other person. Whether they choose to act on the beliefs you have convinced them of depends upon their own moral fiber and daring. But if you go further and "steel" them to the purpose, then you are having an immediate (and probably temporary) effect on their moral fiber, or at least on their emotions: you are whipping them up into a state in which they may do things they will regret later. Even though they are responsible for choosing to do what they do, your "steeling" them to do it implicates you as a cause of the ultimate results. When you take this step beyond "abstract" rational advocacy, you enter upon the wide field of nonrational persuasion and manipulation. This is where the line is now drawn. The current standard is given in *Brandenburg v. Ohio*: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions."<sup>71</sup> Of course "directed to" will necessarily involve criminal intent, if criminal legal action is pursued. I see this as a return to, and restoration of, what Holmes's "clear and present danger" test was intended to be from the beginning.

Several Supreme Court decisions since *Brandenburg* have demonstrated the Court's commitment to this standard. In *Hess v. Indiana* the court reversed a decision of the Indiana Supreme Court by finding that Hess's words "We'll take the fucking street later" or "We'll take the fucking street again" (uttered while facing a crowd at an antiwar demonstration) could not reasonably be considered incitement, but at most constituted mere advocacy of illegal action at some time in the indefinite future (i.e., "later" or "again"). In his dissent from the majority, Justice Rehnquist claimed that

Hess's statement "is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd" and that "there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police."<sup>72</sup> Both sides agree that context is crucial, but the majority places emphasis on the words "later" or "again." Rehnquist never explains exactly how these two words could be interpreted as encompassing the "more or less immediate" future. If "some time in the indefinite future" means "more or less immediate," then this interpretation is possible, but surely this is a stretch. If the Court may interpret "later" to refer to the immediate future, it had better have some significant contextual or other evidence to make this plausible. Since no such evidence was found, the Court rightly held that Hess's statements were protected.

Temporal proximity has also been an important part of two post-*Brandenburg* cases concerning incitement to tax evasion: *U.S. v. Freeman* and *U.S. v. Fleschner*. In both cases the Court noted that the speech of the defendants was "quite proximate to"<sup>73</sup> or "not remote from"<sup>74</sup> the criminal violations (the filing of fraudulent tax returns). Freeman was, and Fleschner was not, permitted to make a First Amendment defense to a jury. The difference between the two cases is that although both gave clear and direct encouragement to filing fraudulent tax returns, Freeman did, and Fleschner did not, include some very general remarks from which a jury might conclude that the point of the speech was simply the unfairness of the tax laws generally, and not directed to inciting imminent fraud.<sup>75</sup>

Again notice that the court is asked to interpret what the speaker actually said in the circumstances in which he said it. Suppose that in court Fleschner repeatedly protests that he didn't really mean to incite anyone actually to file fraudulent returns. Suppose he claims to have meant it as one big joke, that he is a performance artist and that his speech was really intended as mere fantasy material for his audience, to imagine scenarios in which they get all their earnings tax free. How can he be held responsible, he might protest, if some members of the audience took his fantasy material literally and acted upon it illegally?

Surely a court may consider such testimony, but just as surely it needn't be taken as outweighing the court's interpretation of what he actually said in the circumstances in which he said it. As Judge Widener put it, "no reasonable juror could conclude that the defendants' words and actions were merely advocating opposition to the income tax laws."<sup>76</sup> The First Amendment is not a requirement of judicial gullibility. No matter what Fleschner says his intentions were, even if he is telling the truth when he says he didn't really intend anyone to act on his words, no reasonable juror should believe him, given what he actually said and did. His speech actually was followed by illegal actions, and he ought to have seen those actions coming as a direct result of his speech. If he didn't intend those consequences, then he ought to have been more circumspect, and he ought to have realized the effect his speech was likely to have on some of his audience.



In *N.A.A.C.P. v. Claiborne Hardware Co.* the Supreme Court reversed a decision by the Supreme Court of Mississippi and found that the “emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*.”<sup>77</sup> The Court identified two specific things that, if they had been present, would have raised a serious question as to whether Evers’s speeches were protected. First, if his speeches “had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.”<sup>78</sup> However, since the only violent acts connected with Evers’s speeches occurred many weeks later, they could not reasonably be considered to have been “incited” by the speeches. Second, if “there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.”<sup>79</sup> But since there was no such evidence, his speeches could not reasonably be interpreted as incitement.

Notice that the Court does not insist on finding explicitly inciting words, e.g., “I hereby exhort and incite you to this specific illegal act right now!” Whether a person’s words count as incitement is a matter of interpretation. As far back as *Debs* the Court has had no trouble seeing through the attempts of people to mask or hide their inciting language.<sup>80</sup> Again, the First Amendment is not a requirement of judicial gullibility. Crafty Inciters can be quite crafty. But just because incitement is a matter of interpretation, it doesn’t follow that it is purely subjective. The Court is right to look first of all to see what actually happened after the words were uttered. If violence follows within a few seconds or minutes, that would tend to support the interpretation that the words were, and were intended to be, inciting. If the target audience interpreted the words as inciting, that is reason for the Court to interpret the words as inciting.<sup>81</sup> Otherwise, the Court must look for words that are clearly focused on the illegal activity, for example, words that amount to the “authorization of wrongful conduct.” For example, if the speech allegedly incited people to throw bricks at cops, but we find in the text only words about storming Congress and demanding justice, it would be hard to interpret the words as inciting brick throwing.

The Court was right to permit Evers’s “emotionally charged” and “impassioned” language, even though the more passionate aspects of the speech are not directly related to the communication of information or to reasoned public debate. The First Amendment should not degenerate into a requirement of rhetorical insipidity. Speakers must remain free to inflame the heart as well as the mind.<sup>82</sup> However, by the same token, the First Amendment must not degenerate into absolute protection of all imprudence and recklessness. A corollary of the fact that “the pen is mightier than the sword” is the fact that when the liberty to speak is abused, words can cause injuries at least as serious as those inflicted by swords.<sup>83</sup>

## 5. From Pornography to Tapeinography

In part I, I defended the claim that some erotically charged material can cause rape in the sense that it can be a highly salient ingredient in a recipe of

causal factors that actually results in rape. I further claimed that such material was an ingredient that the law can fruitfully address. In the remainder of this article, I use the results of my discussion of incitement to defend this latter claim.

My first task is to use the preceding discussion of incitement to give a definition of the “erotically charged” material that could form the basis for legal action. As the Court now understands incitement, it consists in expression that goes beyond mere advocacy, or abstract teaching, even when the advocacy or abstract teaching is directed toward clearly illegal action. In order to understand the distinction more clearly, think of it not from the point of view of a judge trying to determine when the line has been crossed, but from the point of view of someone intentionally trying to incite others to illegal action. How would you do it? First, you would try to reach beyond abstract intellectual thought, which leads merely to pensiveness. You would try to reach into what motivates people to act, for example, you would try to provoke intense emotions like greed (e.g., Fleschner’s incitement to tax evasion) or anger at perceived injustice (e.g., Schenck’s claim that “a conscript is little better than a convict”). If your intention is not (merely) to inform people, but to incite them to specific action, your best bet is to deemphasize the cognitive elements of your expression and emphasize the emotive or noncognitive elements of your expression.<sup>84</sup> Intense emotions and noncognitive stimulation have a double tendency: (a) they tend to push people out of merely thinking about doing something to actually doing something, and (b) they tend to cloud people’s judgment about the risks of the action they feel like taking.<sup>85</sup>

Both of these tendencies are especially prevalent in material that is directed to arousing intense sexual desire. A number of expressive activities (e.g., moving and still pictures) can act like triggers<sup>86</sup> for intense sexual arousal that (a) tends to push people into sexual action, and (b) tends to cloud people’s judgment about the risks of the sexual action they feel like taking. If the prospect of the pleasure derived from satisfying one’s greed, or one’s political ire, can incite one to illegal action, then by parity of reasoning the prospect of the pleasure derived from satisfying one’s sexual desires can incite one to illegal action.

This satisfies the requirement of imminence. Some pornography can act like striking a match in a gas-filled room; it can steel someone to immediate violent action by making their sexual desire urgent and pressing. Metaphors of burning, fire, flames, and so on are often associated with intense sexual desire for a very good reason: intense sexual desire has the power to cause rash, reckless, dangerous, and illegal action. People can be “blinded by lust” and driven to act on their sexual impulses, even if, after a cold shower, they regret what they did. Some people are more mature than others when it comes to dealing with sexual arousal responsibly, but by the same token, far too many people are less mature.

In order to see how pornography can satisfy the requirement that the allegedly inciting material must be “directed to” producing the imminent illegal action, think again about incitement to tax evasion and incitement to riot. It is perfectly permissible to incite people to greedy or angry behavior.

The problem arises when the greedy or angry behavior incited is illegal. Schenck would have been within his First Amendment rights (both in Holmes's view and on the *Brandenburg* standard) if he had incited politically irate voting. Fleschner would have been within his First Amendment rights if he had incited greedy scrupulousness about claiming legitimate tax deductions. They both crossed the line when their language clearly and on its face aroused greedy and angry *illegal* behavior (i.e., actually filing fraudulent tax forms and impeding conscription).

The same is true of sexual incitement. It is perfectly permissible to incite people to sexual behavior. The line is crossed when the inciting expression clearly and on its face<sup>87</sup> arouses sexually *illegal* behavior like rape. By parity of reasoning, since the arousal of emotions like greed and anger can amount to incitement of illegal action, and hence can fall outside of First Amendment protection, so also the arousal of emotions like lust can amount to incitement of illegal action and hence can fall outside of First Amendment protection.<sup>88</sup>

As an illustration of what I have in mind, compare three sexual scenarios in films. First, imagine a typical romantic seduction in a film. The two meet over drinks, chat and flirt, he drives her home and she invites him in, they kiss, the kisses turn passionate, they begin removing each other's clothing, they fall into bed and the camera soft dissolves as we hear their squeals of delight. If this unimaginative sequence incites anything at all, it might be said to incite flirtation, seduction (in the nonlegal sense), and perhaps even sex. If a man saw a film with this scene in it, and then went out and raped a woman, it would be entirely unreasonable to claim that the film incited his actions.

Compare this with a sex scene in the film *Thelma and Louise* (*T&L*). *T&L* portrays an attempted rape of Thelma. Thelma meets a man in a bar whom she finds attractive and charming. He buys her a drink and invites her to dance. She gladly goes along. As the scene progresses, however, we see him buying her more drinks and insisting that she drink them. Meanwhile, in dancing he repeatedly spins her too much, enhancing her loss of balance and confusion. Allegedly for a breath of fresh air he takes her outside, takes her to a secluded spot in the parking lot, and begins to kiss her. She mildly resists; he persists, she resists more and makes it obvious that she is feeling sick and vehemently wants him to stop. The director and editor portray this sequence in such a way as to arouse in the viewer disgust and such an intense anger at the rapist that we almost cheer when Louise shoots and kills Thelma's attacker.<sup>89</sup> The film portrays Thelma's "no" as really meaning "no," and it portrays the rapist not as a virile lover, but as a despicable and dangerous manipulator. The scene is clearly not directed toward arousing feelings of sexual desire; arousing those feelings in the viewer would prevent the scene from working on the viewer the way the director clearly intended it to work. If a man saw this film, then went out and raped a woman, it would be entirely unreasonable to claim that *T&L* incited his actions.

Finally, compare both of these with how rape is portrayed in some pornography. A commonplace in pornography is the "positive rape outcome"

scenario. The woman initially resists a man's sexual advances, but he knows that her "no" really means "use more force," and when he does, her pleasure begins to increase until she reaches ecstatic orgasm. Here it is not simply sex that is being portrayed in a stimulating way; a very specific kind of sexual desire is being portrayed in a stimulating way. It is portrayed as sexually desirable and stimulating for a man to overcome a woman's "no" with the use of force, and that is rape. Unlike the attempted rape in *T&L*, such rapes are portrayed in a purely positive way so as to arouse, rather than to disgust or to anger. As with Mr. Evers's speech in *N.A.A.C.P.*, if such a portrayal gives evidence of "authorization of wrongful conduct," then it may also be considered evidence of intent to incite that wrongful conduct. If a man saw this film, and then raped a woman very soon afterward, it may very well be the case, depending upon the particular circumstances, that the film incited his actions.

At this point it is important to give a definition of the sort of material I have been discussing. In doing so, I take caution primarily because this is an area where definitions are notoriously vague or subjective, and because when people interpret definitions, they tend to rely upon their own preconceptions. For example, when Circuit Judge Easterbrook ruled against the constitutionality of the Dworkin-MacKinnon pornography ordinance in Indianapolis, he objected to the definition of "pornography" given in the ordinance partly on the grounds that it was too broad by not taking into account the "literary or political value" the pornographic works may have as a whole, and because it was too narrow by leaving out much graphic and sexually explicit work.<sup>90</sup> These worries appear to come from nowhere. When the court considers other speech-related crimes, such as perjury, it doesn't worry about whether the criminal expression has any "literary or political value." Bank robbery is bank robbery regardless of the literary merit of the note I pass to the cashier. Clearly what Easterbrook is assuming, without argument, is that the "pornography" ordinance must be some kind of "obscenity" ordinance. He does this in spite of the fact that the ordinance defines "pornography" as a kind of "subordination." To relate this to other parts of the law, one must relate it either to the "equal protection" clause of the Fourteenth Amendment or to the speech-related crime of defamation.<sup>91</sup>

To avoid a similar confusion, I state outright that my concern with sexually arousing material has nothing to do with its "obscenity." In this article I am not at all interested in protecting people from having their senses of decency offended. I am interested in redressing the harms of the people who are sexually assaulted because some people make a profit out of intentionally inflaming people's desires for sexual violence. I am interested not in the obscenity exception to the First Amendment, but in the incitement exception.

Since the material I am interested in is not "obscenity," and because "pornography" and even "hard-core pornography" are often applied to far more material than that which incites sexual crimes, I need to use a new word. I have coined the word "tapeinography" (pronounced tah-pay-nography) from one of the Greek words for "rape."<sup>92</sup> Here is my definition: "Tapeinography is any graphic sexually explicit material that is, clearly and

on its face, directed to producing intense sexual arousal for sexual assault including, but not limited to, rape." The material must be "sexually explicit" because that is the core mechanism for arousing sexual desire, as opposed to arousing feelings of love or intimacy. The material must be "graphic" because that is what intensifies the effect of the material, and can, under many different circumstances, push someone into acting on his sexual arousal. The material must be directed to a specific kind of sexual arousal. If my speech is directed to inciting people to move to their right and to picket Congress, but they instead move to their left and throw bricks through windows, then my speech cannot properly be said to have incited the criminal activity they actually engaged in. If material is clearly directed to arousing sexual desire in a context of mutual consent, but someone misuses the material to help him maintain an erection during a rape, then it cannot be the material that incited his illegal action. If material provides information (either in words or in pictures) on how to ensure your partner's comfort, and a man uses that information systematically to deny his unwilling partner any relief at all, then it cannot be the material that incited his illegal activity. The material must incite the kind of action he actually commits.<sup>93</sup>

I have already argued that as incitement, this kind of material is just as devoid of First Amendment protection as incitement based on greed or anger. I would recommend calling legal action against this material "tapeinographic incitement to sexual assault" to make it clear that it is actionable only when and because it amounts to incitement to illegal action. Consequently, in spite of the fact that legal action against tapeinography would be a content-based restriction on speech, the "strict scrutiny" test would not be necessary: it need not be shown that action against tapeinography "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."<sup>94</sup> Furthermore, since sexual arousal is a particularly strong feeling and an especially strong motivator of action, there is reason to focus on it as a special category of incitement and not simply as one among many ways of inciting illegal or dangerous action. As the court has recently said: "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."<sup>95</sup> Of all the ways to incite someone to action, stimulating him to intense sexual arousal is surely one of the most inciting. Hence, sexually inciting material should be actionable either under general anti-incitement ordinances or under anti-incitement ordinances narrowly focused on material that incites people to commit sexual assault.

Finally, although action against tapeinographic incitement is content-based, it does not amount to "viewpoint discrimination." First, outside of "Get her!" it is not clear that tapeinographic material contains any viewpoint or message at all.<sup>96</sup> Much graphic sexually explicit material is designed simply to provoke sexual arousal, and the expression of a viewpoint or a message can get in the way of the primary goal. But even if there is a viewpoint expressed, for example, that sex is good, tapeinography is actionable not because of the viewpoint expressed, but because of the manner in which it is expressed, that is, because it is expressed in a way that



incites sexual assault. Finally, action against tapeinographic incitement is not viewpoint discrimination because it does not restrict all material that expresses the same viewpoint (i.e., if it does express a viewpoint at all). I am persuaded by the arguments of Dworkin and MacKinnon that the viewpoint expressed in a great deal of graphic sexually explicit material, and even in material that is not especially graphic or explicit, such as mainstream advertising, is that women are inferior, subordinate, unequal, and almost subhuman.<sup>97</sup> Although I find this viewpoint reprehensible, it is not my disfavor of the viewpoint that is the basis for tapeinographic incitement to sexual assault. I would defend the First Amendment right of anyone to advocate subordinating women by sexually assaulting them. For example, someone might quote *Ephesians* 5:22–24, where St. Paul commands women to submit to their husbands in everything, and on the basis of this passage teach the moral necessity of sexually assaulting one's wife to secure her submission. I would defend anyone's First Amendment right to teach or preach this, as long as he did so responsibly and did not go beyond "mere abstract teaching" to actual incitement of sexual assault.<sup>98</sup> The basis for legal action against tapeinography is that regardless of the viewpoint expressed, it is expressed in a manner that incites illegal action and hence is actionable under general incitement ordinances, and since it incites in an intensely inciting manner, it could also be actionable under more specific ordinances.

Cutting across this general/specific distinction is the criminal/civil distinction. There can be criminal action against incitement in general and civil action against incitement in general. There can also be criminal action against a specific kind of incitement, as well as civil action against a specific kind of incitement. For my purposes, there are two main differences between the criminal and the civil types of action. First, criminal but not civil action against incitement to sex crimes could be applied even before anyone gets hurt, and that is a serious consideration in its favor. The problem is that criminal statutes would, in effect, increase the police power of censorship. The police could, in theory, enter video stores and bookstores that sell videos and search for tapeinography. Recall Justice Black's warning against making liberty in this country "dependent upon the efficiency of the Government's informers."<sup>99</sup> Granting to the police the power to search bookstores and video stores for tapeinography could seriously affect the ability of such establishments to profit from perfectly legal pornography. It also raises the possibility that some police departments will target gay and lesbian bookstores on the grounds that they are searching for tapeinography.<sup>100</sup> It would not be unreasonable to support civil action against tapeinography while at the same time being against criminal action against tapeinography.<sup>101</sup>

Another difference between criminal and civil action against incitement to sex crimes is that normally civil action does not have the same intent requirements as criminal action. In an important recent case in the Fourth Circuit, Judge Luttig (citing *U.S. v. Peoni*) made the following observation: "As Judge Learned Hand explained in discussing generally the difference between civil and criminal aiding and abetting laws, the intent standard in the civil tort context requires only that the criminal conduct be the 'natural



consequence of [one's] original act,' whereas criminal intent to aid and abet requires that the defendant have a 'purposive attitude' toward the commission of the offense."<sup>102</sup> It is possible that a woman who had been raped because of tapeinographic incitement would not have to prove that the publishers and/or distributors of the tapeinography actually intended her to be raped, or intended that anyone be raped, but only that the material was clearly and on its face of such a nature that its "natural consequence" would be to stimulate some man to rape some woman.<sup>103</sup>

However, as Luttig also noted, "the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled."<sup>104</sup> Since tapeinography could be considered "low value speech,"<sup>105</sup> it is not clear that such a "heightened intent requirement" would be appropriate.<sup>106</sup> But even if it were used, a plaintiff might very well be able to meet that heightened burden of proof.<sup>107</sup> For example, imagine a tapeinographic book called *Captured: Instructions for the Most Enjoyable Rape You'll Ever Get Away With*.<sup>108</sup> If the content of the book matches its title and is clearly and on its face directed to arousing intense sexual desire for rape, and the book includes detailed information about abduction and rape and technical information about eluding police capture and prosecution, a jury could possibly consider this to be evidence of intent to aid, abet, and/or incite rape.

Furthermore, if the book contains language and/or photos that praise rapists as the most virile of men and denigrate nonrapists as weaklings and not real men at all, then its "extensive, decided, and pointed promotion"<sup>109</sup> of rape could possibly be taken by a jury to prove intent to incite rape.<sup>110</sup> Remember that Holmes's interpretation of Schenck's speech was not unreasonable: if a document assumes that there are only two alternatives, and it characterizes one in a very negative fashion while characterizing the other in a very positive fashion, it is reasonable to assume that the one responsible for the document is trying to influence the audience away from the first and toward the second alternative. Consider *Hustler's* article on autoerotic asphyxiation called "Orgasm of Death." What did it mean when it chose to put this article in one of its regular sections, entitled "Sexplay"? By putting it in the "Sexplay" section, doesn't that immediately undermine any negative feelings that might otherwise have been aroused by the word "Death" in the title? A reader might reasonably assume that when it says "Orgasm of Death," it means only "Orgasm of Play-Death," and might take the warnings as only part of the fantasy. Consider also the nature of the section "Sexplay," as depicted in this description, which accompanied the article: "Many sexual pleasures have remained hidden for too long. . . . In keeping with *Hustler's* belief that the repression of natural and healthy urges is physically and emotionally damaging, we present this series of informative articles to increase your sexual knowledge, lessen your inhibitions and—ultimately to make you a much better lover."<sup>111</sup> What does it mean for *Hustler* to praise the reader who overcomes "inhibitions" but then attaches a warning to an article about a "hidden" sexual pleasure? What does it mean when you warn someone against trying something just after praising

people who don't obey warnings? The Crafty Inciter is just as guilty as the obvious inciter.

Recall that in *U.S. v. Freeman*, it was decided that Freeman was permitted to make a First Amendment defense to the jury because his speech included some general discussion of the propriety of filing fraudulent tax returns. His general statements were not an automatic bar to prosecution; they simply presented a jury question. Similarly, *Hustler* should not be held to a more stringent standard simply because it is pornographic. Adding a few general comments doesn't automatically protect otherwise inciting speech.

Also, as with *Fleschner*, the fact that a member of the target audience interpreted the article as incitement and was moved from thought to action could be taken by a jury as evidence that the speech was incitement. Sometimes audience members correctly interpret the speech directed at them.

Furthermore, as with *Fleschner*, *Hustler* might claim that it intended the article only as mere advocacy, or as purely informative, or as mere fantasy material. It might argue that it cannot be held responsible if some members of the target audience took this fantasy material literally and acted upon it illegally. Surely a court may consider such testimony, but just as surely it needn't be taken as outweighing the court's interpretation of the content of the article and the manner in which it is presented. Again, the First Amendment does not require judicial gullibility. Even if the editors of *Hustler* are telling the truth about their intentions when they say they didn't really intend for anyone to attempt autoerotic asphyxiation as a direct result of reading their article, a reasonable jury may not be convinced. The speech actually was followed by illegal or reckless actions, and a jury may reasonably find their current protestations to the contrary unconvincing, given the actual content of the article and the manner in which it was presented.

Recall also *Hess v. Indiana*. "We'll take the fucking streets later" cannot be construed as incitement to *imminent* action. The Court was divided on this issue, but the majority's position is clearly a reasonable one. However, suppose Hess had said this: "This police repression of natural and healthy democratic urges to take the streets now is physically and emotionally damaging to you as citizens of a democracy. Courageous citizens who disobey such fascist orders are much better citizens." This is quite different from "We'll take the fucking streets later." It still may not be incitement, but depending upon the circumstances, it may present a jury question, especially if members of the target audience interpreted it as incitement to illegal action and immediately began rioting. As in *N.A.A.C.P.*, this speech might be interpreted by the jury to be "authorization of wrongful conduct," and as such it might be taken as evidence that Hess is guilty of incitement to riot. Even if Hess later claims that he intended his speech as mere utopian fantasy material for the imagination of his listeners, a jury could find that he intended to cause an imminent riot, just as Jerry Rubin's "Let's get these fuckers out of here" was interpreted as intent to cause an imminent riot.<sup>112</sup>

If the jury may make such determinations in such cases, then by parity of reasoning, it ought to be permitted to make such determinations in cases involving tapeinography. If a woman was raped very soon after the rapist

consumed tapeinographic material, or indeed while he was consuming it,<sup>113</sup> the jury has reason to consider whether the tapeinography amounted to incitement to the crime. If it contains an “authorization of wrongful conduct,”<sup>114</sup> a jury may consider that to be evidence of intent to cause rape.

Return to my hypothetical book, *Captured*. To determine intent, the jury may also consider the marketing strategy used to promote the book. If it uses a strategy that is intended to attract rapists and would-be rapists, then a jury could possibly consider this to be evidence of intent to aid, abet, and incite rape.

Finally, a jury would be faced with determining what purposes the book could reasonably be thought to serve. If the evidence from its title, its content, and the marketing strategy used to promote it caused the jury to conclude that the only plausible hypothesis was that its purpose is to facilitate rape, then that purpose could possibly be used by the jury to determine intent to aid, abet, and/or incite rape. Again, it might contain some general comments about sexuality, masculinity, and so on. That would give those responsible for the tapeinography the opportunity to present a First Amendment defense to a jury, but it would not automatically bar a civil suit. It would be up to a jury to decide. The author and publishers might claim that the book was intended as fantasy material to aid in the commission of nothing more than masturbation. That too would give them the opportunity to present a First Amendment defense to a jury, but it would not automatically bar a civil suit. Again, it would be up to a jury to decide if the material could reasonably be thought to incite nothing more than rape fantasies, or if it stepped over the line to inciting actual rape.

Civil action against those who profit from the incitement of sex crimes is a way that the law can fruitfully address this ingredient in the causal recipe for sexual assault. Victims of sex crimes often incur serious financial loss, not only from medical bills due to direct injury, but sometimes from secondary effects due to pregnancy,<sup>115</sup> lost pay from missing work, and bills for psychological therapy. Sex crimes take a devastating toll on their victims, and if the law can in any way ameliorate their situation, it ought to.

On the other side, there are those who profit from the incitement of sex crimes. It is a long-standing and fundamental feature of our society that the freedom of speech is not absolute. The First Amendment is not a license for complete irresponsibility. For whatever reasons, there has been an explosion in the pornography industry in recent decades,<sup>116</sup> and as we know from past experience, when the opportunity for profit is significant, those who try to capitalize on that opportunity are not always as circumspect as they ought to be.<sup>117</sup> Like children testing the limits of what they can get away with, those intent on profit will push the line of what is acceptable until they are instructed that they have gone too far. Crossing the line from mere advocacy of sex crimes to actual incitement of sex crimes is going too far, and it is the function of the law to address such violations. Perhaps among legally upright individuals tapeinography will incite nothing more than rape fantasies, but a moment’s reflection on the broader social circumstances should lead publishers to realize that they are not putting their material out in a scientifically controlled environment. In a society in which

about a third of all men say they would rape a woman if they knew they could get away with it,<sup>118</sup> it is quite likely and foreseeable that indiscriminately and widely distributed tapeinography will incite some man to rape some woman.

I end by saying something about one of the most ubiquitous objections to permitting legal action against sexually explicit material: the slippery slope objection,<sup>119</sup> used recently in *Rice v. Paladin* to protect Paladin Enterprises from civil liability for a book it published entitled *Hit Man: A Technical Manual for Independent Contractors*. Here is Judge Luttig's characterization of the argument, together with his initial response: "Paladin, joined by a spate of media *amici*, including many of the major networks, newspapers, and publishers, contends that *any* decision recognizing even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press. . . . That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin *admits* it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking."<sup>120</sup> Using an argument based on the potential for slippery slope to defend knowingly and intentionally aiding and abetting murder is like the NRA arguing for a Second Amendment right to armor-piercing bullets on the grounds that if the government can restrict that ammunition, then it can "disturb decades of [Second] Amendment jurisprudence."<sup>121</sup> The Second Amendment is not an absolute guarantee for every citizen to own any firearm, and the First Amendment is not an absolute guarantee for every citizen to express herself or himself in any manner whatsoever. In other words, just as placing legal restrictions on the private ownership of weapons will not inevitably lead to unacceptable infringements of the Second Amendment, so also placing legal restrictions on speech will not inevitably lead to unacceptable infringements of the First Amendment.<sup>122</sup> The recent documentary *Shooting Porn* (Larson 1997) nicely illustrates this. In one segment, the director of a pornographic video complains to the interviewer that the production company has a set of guidelines he must follow, and those guidelines prohibit him from erotically displaying sexual violence. For example, during one sex scene an actor being sexually penetrated (who was in fact in some physical pain because the penis penetrating him was so large it displaced his stomach and made him just a bit nauseous) is acting the part of someone experiencing sexual pleasure, and he moans ". . . no, no, no . . ." With the camera still rolling, the director reminds him that the guidelines won't permit that, since it gives the appearance that the sex is against his will. Without missing a beat the actor simply continues with ". . . yes, yes, yes . . ." Though the director and actors were clearly annoyed with what they saw as irrational limits placed on their artistic creativity, the limits were clearly ones that required only trivial modifications. Perhaps this is some violation of aesthetic value, but compared to the violation of someone who is brutally raped as a direct result of the incitement to sexual assault, the positive consequences of the guidelines seem well worth those trivial infringements of artistic value.<sup>123</sup>

Of course it is always *possible* that widespread censorship will follow from such restrictions, but because the future is uncertain, there are possible bad consequences for *every* legislative action. Fear of possible future dangers should not lead legislators to do nothing at all, or they would never do anything.<sup>124</sup>

Or to turn the argument around, if the *amici* of Paladin were to win the day on this issue, what would there be to stop others who aid and abet crime from demanding that their expressive activities be protected by the First Amendment? If incitement to illegal action is swept under the protection of the First Amendment, what is next? Perjury? Insider trading? Bank robbing?<sup>125</sup> In other words, for this slippery slope, there is a slope that slips the other way.<sup>126</sup> If we slip one way, we are in danger of being crushed by the Scylla of rampant censorship; if we slip the other way, we are in danger of drowning in the Charybdis of rampant crime. At times it is difficult to steer the ship of state safely. But with *Hit Man* the court had no trouble seeing the proper course. Aiding and abetting crime, including abetting crime by inciting it, has never been protected by the First Amendment.<sup>127</sup> It would not “disturb decades of First Amendment jurisprudence” to hold someone accountable for aiding, abetting, and/or inciting murder.

It is no different with a civil action against tapeinography. My argument is a “parity of reasoning” argument. If the First Amendment does not protect incitement to illegal action on the basis of anger or political ire, then by parity of reasoning it also should not protect incitement to illegal action on the basis of lust. If we grant the latter kind of incitement First Amendment protection, then there is no principled reason why we should not grant the same protection to the former kinds of incitement, and as I just argued, if we do that, then we would seem to be on a slippery slope to interpreting the First Amendment as an absolute protection of all expressive activity, no matter how criminal.

Of course, one might try to give a principled reason why incitement to illegal action on the basis of lust is different from other kinds of incitement. First, lustful actions are something we need to hold people responsible for; we cannot any longer accept the old dictum that “boys will be boys.” But of course this overlooks the fact that incitement is not an exculpatory cause of sexual assault. Certainly we do need to hold people responsible for their lustful acts, but since lust, together with greed and anger, are especially powerful motivators of action, we also must hold responsible those who cross the line from mere advocacy to incitement of illegal actions on the basis of those emotions. Second, unlike incitement on the basis of anger or greed, incitement on the basis of lust has to do with one of the most intimate spheres of human life: sexuality. This may have been in the past a perfectly good reason to treat this kind of incitement differently, but that is partly because sexual relations between men and women were not considered to be relations between two citizens with equal protection under the law. But now that women do have the equal protection under the law, whatever a man does to a woman is something he does to a fellow citizen who deserves the fullest protection the law can give. Third, unlike incitement on the basis of anger or greed, there is a striking gender disproportion among the



victims of incitement on the basis of lust: by far, most of the victims are female. This also may have been in the past a perfectly good reason to treat this kind of incitement differently, but now that women must be granted the equal protection of the laws, it is no longer a good reason.

Balkin (1990) has argued that we can use a society's rhetoric of responsibility to discover some of its underlying "ideology." If other kinds of incitement are subject to legal action, but tapeinographic incitement is not, what does that say about our underlying "ideology"? What sort of ideology makes a special exception when it comes to inciting (almost exclusively) men to sexually assault (almost exclusively) women? What would that say about our "ideology" regarding male access to women's bodies? Would it evince an "ideology" according to which men have something that looks like a right of access to women's bodies? Would it evince an "ideology" according to which women do not really have the *equal* protection of the law?

One final word about the slippery slope worry. The inspiration for my argument in this article is the work of many feminists who have argued, in some cases persuasively, to my mind, that "pornography" does play a significant role in the social and political subordination of women. If this is correct, then legal action against tapeinography may play a small role in furthering the equal status of women, and so may very well contribute to far-reaching consequences.<sup>128</sup> So to a certain extent, I think slippery slope worries are not entirely unreasonable. However, we have every reason to think the slippery slope will be positive, rather than negative. The recognition of the former slaves as deserving equal protection under the law required very serious reworking of the legal sphere for well over a hundred years (and this work may very well be still unfinished); it is not unreasonable to suppose that the recognition of women as deserving equal protection under the law will require some similar reworking. Legally to require former slave owners to behave more responsibly toward their former slaves was a very serious change in the limits of personal liberty: they were no longer free to behave in certain ways that they had taken for granted as their right. Many raised slippery slope objections: If we free the slaves, what other racist behaviors would then become illegal? What other personal freedoms would be infringed? Would whites be deprived of their freedom to associate with only whites in railway cars, in public accommodations and public restrooms, at lunch counters? Ultimately, they feared, freeing the slaves would lead to the complete destruction of white supremacy. Many of the people who voted for the Reconstruction amendments did worry about this, but they chose to treat the abolition of slavery as a matter of basic fairness. For the sake of justice they were willing to risk the chance that future generations would not share their tolerance for racism as a legitimate exercise of individual liberty. Similarly, if we see legal action against pornography on the grounds that it can cause rape as a matter of basic justice, treating like cases alike regardless of gender, we must risk the chance that future generations will not share our tolerance for misogyny as a legitimate exercise of the freedom of speech.



*I thank the Philosophy Department of Harvard University for awarding me the position of Visiting Scholar for the 1993–94 academic year, during which I did much of the initial research for this article. I also thank the anonymous referee for numerous helpful and instructive comments.*

## Notes

<sup>1</sup> *American Booksellers Association v. Hudnut*, 771 F.2d 323 (1985) at 333.

<sup>2</sup> *Ibid.* at 334.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 333.

<sup>5</sup> Hempel 1966, 53.

<sup>6</sup> *Hollidge v. Duncan*, 85 NE 186 (1908).

<sup>7</sup> I take this fact to show both that covering laws are not necessary, and that they are not sufficient, for a finding of causal responsibility.

<sup>8</sup> "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." Pollock 1920, 36.

<sup>9</sup> I do reject Hempel's theory, but my argument so far is not sufficient for a refutation. For a more sustained attack on the covering law model, and for the source of my argument here, see Miller 1987, chap. 1, esp. 50–51.

<sup>10</sup> Collingwood 1939, 304. Please note that I do not endorse every aspect of Collingwood's theory of causality. In particular, I do not agree with the main point he is trying to make with this example, that is the metaphysical relativity of causes. Collingwood wants to say that the cause of the accident really is different for each of the three people he lists, whereas I would want to say that each of the three people he lists finds salient three different causal factors.

<sup>11</sup> Collingwood 1939, 296.

<sup>12</sup> Gasking 1955, 164.

<sup>13</sup> Collingwood 1939, 294.

<sup>14</sup> Nozick 1974, 130.

<sup>15</sup> Wright 1992, 56.

<sup>16</sup> O'Neil 1995, 20.

<sup>17</sup> In 1995, the Illinois State Legislature passed the Civil Justice Reform Amendments of 1995 (Pub. Act 89–7), one section of which (§ 2–1117) abolished joint and several liability in favor of proportionate several liability. The Supreme Court of Illinois found this unconstitutional in a decision handed down on December 18, 1997, *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (1997). See Wright 1992 for the current state of confusion over joint and several liability.

<sup>18</sup> I have in mind cases where several causes were involved in causing a single injury. If one driver negligently hits a pedestrian and, while he is lying there, another driver comes along and negligently runs over him, causing a new and distinct injury, then we have separate injuries and separate causes that may not be held jointly and severally liable. *Adams v. Parrish*, 225 S.W. 467 (1920). Note also that I am not discussing the apportionment of damages, which may be differentially assigned.

<sup>19</sup> Collingwood 1939, 303.

<sup>20</sup> Here again I differ somewhat from Collingwood. Whereas Collingwood insists that there is nothing more to "x caused y" than that x is a "handle" that could be used to produce or prevent y, I think there is more to it. I don't find it absurd to think that there may be some causes that, even in theory, no one can do anything about.

<sup>21</sup> *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470 (1987); compare also *Neurological Medicine, Inc. v. General American Life Insurance Co.*, 921 S.W.2d 64 (1996).

<sup>22</sup> *Lemmon v. Continental Casualty Co.*, 169 S.W.2d 920 (1943) at 927–29.

<sup>23</sup> *Fuller v. Preis*, 322 N.E.2d 263 (1974).

<sup>24</sup> *Baxter v. Safeway Stores, Inc.*, 534 P.2d 585 (1975), and *Garmon v. General American Life Ins. Co.*, 624 S.W.2d 42 (1981).

- <sup>25</sup> *Wallace v. Bounds*, 369 S.W.2d 138 (1963) at 143–44, and *Garmon v. General American Life Ins. Co.* at 47. Compare also *R. D. v. W. H.*, 875 P.2d 26 (1994), in which years of sexual abuse, dating back to childhood, presented a jury question as to whether the abuser was causally responsible for the suicide of the abused.
- <sup>26</sup> *Padula v. State of New York*, 398 N.E.2d 548 (1979).
- <sup>27</sup> Notice that this case involves language, but doesn't raise any First Amendment issues. However, compare this with *Clift v. Narragansett Television L.P.*, 688 A.2d 805 (1996), which involved a television news reporter. The judge decided, with some trepidation, that the "uncontrollable impulse" rule should apply to media just as it does to everyone else (at 811).
- <sup>28</sup> For a useful recent discussion of sex offenders and pornography, see Wyre 1992.
- <sup>29</sup> Wyre 1992, 244.
- <sup>30</sup> I think that this same kind of reasoning would prevent legal action against producers and distributors of pornography on the grounds that they "addicted" people to their product, and as a result of that addiction, they commit various sex crimes. Compare *Zamora v. Columbia Broadcasting System, et al.*, 480 F. Supp. 199 (1979), in which Ronny Zamora and his parents sued CBS, ABC, and NBC for addicting him to TV violence, thus causing him to murder an 83-year-old neighbor. In dismissing this suit Judge Hoeveler pointed out that the alleged causal mechanism for addicting someone to violence is neither a part of common sense, nor a subject of any scientific knowledge. Hence the suit "is so devoid of guidance and so lacking in a showing of legal cause that the complaint must be dismissed" (at 203). In addition, if the suit were successful, it "would provide no recognizable standard for the television industry to follow" (at 202). Legal action against pornography on the grounds that it addicted people to sex, thereby causing them to commit sex crimes, would be subject to these serious objections.
- <sup>31</sup> Compare *Watters v. TSR, Inc.*, 904 F.2d 378 (1990), in which Sheila Watters sued TSR on the grounds that its game *Dungeons & Dragons* caused her son to lose touch with reality, and as a result, "he lost control of his own independent will and was driven to self-destruction." She argued that TSR was negligent in permitting its game to be sold to "mentally fragile persons" and that it failed to warn that the "possible consequences" of playing the game might include "loss of control of the mental processes" (at 381). Quite rightly, these charges did not present a jury question: the "defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player" (at 381).
- <sup>32</sup> Being startled by someone else may take away any guilt you might otherwise have had. See for example *Williams v. Ballard Lumber Co.*, 83 P 323 (1906), in which the plaintiff was working under some machinery that unexpectedly started up.
- <sup>33</sup> I say "about" because, as I point out in the next section, there are other cases of exculpatory causes, even ones that involve "mental intermediation."
- <sup>34</sup> I take this phrase from Judge Easterbrook in *American Booksellers Association v. Hudnut* at 329.
- <sup>35</sup> *Shafer v. Keeley Ice Cream Co.*, 234 P 300 (1925) at 303.
- <sup>36</sup> *Ibid.*, 301.
- <sup>37</sup> I suppose someone could argue for legal restrictions on the access of certain unbalanced individuals to pornography. However, it would be unreasonable to expect publishers or distributors to bear the brunt of making sure that their material doesn't fall into the hands of unbalanced individuals.
- <sup>38</sup> *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U.S. 409 (1876) at 474.
- <sup>39</sup> *Weisman v. Tobinson Clay Products*, 66 O.O.2d 125 (1968) at 127.
- <sup>40</sup> *Loeser v. Nathan Hale Gardens, Inc.*, 425 N.Y.S.2d 104 (1980) at 107.
- <sup>41</sup> *Atamian v. Supermarkets Gen. Corp.*, 369 A.2d 38 (1976).
- <sup>42</sup> *Delaney v. University of Houston*, 835 S.W.2d 386 (1992).
- <sup>43</sup> *Schiro v. Clark*, 963 F.2d 962 (1992) at 972. On the power of arousal to cause someone to act, see Zillman 1978, 1982; Sapolsky 1984; and Einsiedel 1992. Although this is a vivid description of the causal mechanism involved in inciting rape, this may not be the sort of case that would easily form the basis for an incitement charge against the

"girly books." First of all, "girly books" is much too vague. If the material merely presented women in a sexually appealing manner, it could not reasonably be considered incitement to rape. Second, the speaker, who received the death penalty, was clearly disturbed, since he had sex with his victim's corpse and chewed on several parts of her dead body. This could present evidence that he would have raped even without the incitement of the "girly books," and hence that the material was not a significant cause of his illegal behavior.

<sup>44</sup> Since the causal mechanism by which pornography causes rape is one familiar to everyday experience, expert testimony regarding laboratory studies of various kinds of sexual material would be irrelevant in a trial. If expert testimony "concerns matters that are not beyond the comprehension of the average juror, relying on their common sense or everyday knowledge," then it need not be admitted in evidence. See *Robertson v. McCloskey*, 676 F.Supp. 351 (1988) at 354. Also, since in a criminal or a civil trial the question would be whether a particular piece of pornography caused a particular individual to commit a particular act on a particular occasion, large-scale statistical studies of correlations between pornography and violence in different countries (e.g., Kutchinsky 1973) would not be relevant. Hence I disagree with Berger's argument that the scientific evidence is sufficient to rule out antipornography laws (see Berger 1991, 170–75). Much the same goes for Freedman's arguments (1996, 908–11). Finally, since there are so many different types of scientific studies based on significantly different definitions of "pornography" and "aggression" and so on, and since there is no agreed-upon way to extend laboratory results to the real world, the courtroom would turn into a battleground between competing scientists, and this would only serve to confuse a jury. If expert testimony is likely to confuse the jurors on matters that are well within their grasp, that is grounds for excluding such testimony. See *Robertson* at 352–53. For a helpful discussion of some of the philosophical issues surrounding the scientific question of whether pornography can "cause" rape, see Schauer 1987. Schauer is a good antidote to many of the confusions in Greenberg and Tobiason 1993.

<sup>45</sup> Hence I disagree with Marianne Wesson that the foreseeability of harm being caused by pornography depends upon increasing scientific data showing a causal connection between pornography and sexual assault. See Wesson 1993, esp. 865–66.

<sup>46</sup> *Schenck v. U.S.*, 39 S.Ct. 247 (1919); *Frohwerk v. U.S.*, 39 S.Ct. 249 (1919); *Debs v. U.S.*, 39 S.Ct. 252 (1919); *Abrams v. U.S.*, 250 U.S. 616 (1919).

<sup>47</sup> *Schenck v. U.S.* at 249.

<sup>48</sup> In *Frohwerk v. U.S.*, 249 U.S. 204 (1919), and even more explicitly in *Debs v. U.S.*, 249 U.S. 211 (1919), Holmes finds speech in which all three elements are "the same" unprotected.

<sup>49</sup> Holmes recognizes this in his dissenting opinion in *Abrams*. He notes that even with an unintentional action the agent "may be liable for it even if he regrets it" (*Abrams v. U.S.* at 627). The legal history of this distinction is recounted by Hand (*U.S. v. Peoni*, 100 F.2d 401 (1938) at 402): "The prosecution's argument is that, as Peoni put the [counterfeit] bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni's original act, with which he might be charged. If this were a civil case, that would be true; an innocent buyer from Dorsey could sue Peoni and get judgment against him for his loss. But the rule of criminal liability is not the same . . ." I consider the different standards for criminal and civil law with respect to pornography below.

<sup>50</sup> *Swift & Co. v. U.S.*, 196 U.S. 375 (1904), referenced in *Abrams v. U.S.* at 628.

<sup>51</sup> *Frohwerk v. U.S.*, 39 S.Ct. 249 (1919) at 251.

<sup>52</sup> For example, in his dissent in *Abrams*, Holmes claims that "a silly leaflet by an unknown man" couldn't seriously be thought to pose a danger, but even so, if it could be shown that the "unknown man" actually had the purpose of posing a danger, that "might be punishable" (*Abrams v. U.S.* at 628).

<sup>53</sup> *U.S. v. Peoni* at 402.

<sup>54</sup> *Abrams v. U.S.* at 630–31.

<sup>55</sup> Concurring opinion in *Noto v. U.S.*, 81 S.Ct. 1517 (1961) at 1523.

<sup>56</sup> *Schenck v. U.S.* at 248–49.

<sup>57</sup> *Abrams v. U.S.* at 621 (italics omitted).

<sup>58</sup> Theoretically this could be a Crafty Inciter case, and Holmes is aware of this possibility, but he quite rightly rules out the possibility that the speech in question can reasonably be interpreted as a serious attempt to organize a movement that has a real chance to impede the war effort.

<sup>59</sup> *Schenck v. U.S.* all at 248.

<sup>60</sup> *Abrams v. U.S.* at 627.

<sup>61</sup> *Frohwerk v. U.S.*, 39 S.Ct. 249 (1919) at 251.

<sup>62</sup> *Gitlow v. People of the State of New York*, 268 U.S. 652 (1925).

<sup>63</sup> *Ibid.* at 656.

<sup>64</sup> *Ibid.* at 669.

<sup>65</sup> Brandeis brings this out clearly in his dissent, joined by Holmes, in *Whitney v. California*, 47 S.Ct. 641 (1926) at 647. The Supreme Court explicitly accepted this loosening of First Amendment protection in *Dennis v. United States*, 71 S.Ct. 857 (1951): “an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent” (at 867).

<sup>66</sup> *Whitney v. California* at 649.

<sup>67</sup> *American Communications Association v. Douds*, 339 U.S. 382 (1950) at 412; *Dennis v. U.S.* at 866.

<sup>68</sup> It is a bit surprising, then, that the court upheld Eugene Dennis’s conviction for violating the Smith Act of 1940 by forming a Communist political party.

<sup>69</sup> *Yates v. U.S.*, 354 U.S. 298 (1957); *Noto v. U.S.*, 81 S.Ct. 1517 (1961).

<sup>70</sup> *Noto v. U.S.* at 1521.

<sup>71</sup> *Brandenburg v. Ohio*, 89 S.Ct. 1827 (1969) at 1829.

<sup>72</sup> *Hess v. Indiana*, 94 S.Ct. 326 (1973) at 330.

<sup>73</sup> *U.S. v. Freeman*, 761 F.2d 549 (1985) at 552.

<sup>74</sup> *U.S. v. Fleschner*, 98 F.3d 156 (1996) at 158–59.

<sup>75</sup> Because incitement to tax evasion is not protected by the First Amendment, I disagree with one of Judge Rubin’s arguments in *Herceg v. Hustler Magazine Inc.*, 814 F.2d 1017 (1987). Rubin argued that the article on autoerotic asphyxiation called “Orgasm of Death” could not have incited Troy Herceg’s failed attempt, which resulted in his death, partially on the grounds that “[i]ncitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior” (at 1023). Even if Rubin is right that this is the “root of incitement theory” (against which see *Hand in U.S. v. Peoni* at 402), the tree has since grown. Inciting someone to cheat on his taxes is not very like inciting an angry mob to burn down a corn silo. The mere fact that “Orgasm of Death” was not like setting off an angry crowd does not by itself show that it did not incite Troy’s attempt at autoerotic asphyxiation.

<sup>76</sup> *U.S. v. Fleschner* at 159.

<sup>77</sup> *N.A.A.C.P. v. Claiborne Hardware Co.*, 102 S.Ct. 3409 (1982) at 3433.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at 3434.

<sup>80</sup> According to Holmes, Debs said that he “had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more” (*Debs v. U.S.* at 253). Although I disagree with the Court’s finding in this case, I quite agree that the First Amendment does not require the Court to be naive in its interpretations of expression.

<sup>81</sup> Compare *Texas v. Johnson*, 109 S.Ct. 2533 (1989). Since no breach of the peace actually occurred following Johnson’s burning of the flag, the Court was inclined to reject the interpretation of the flag burning as incitement. Since, further, there was no evidence “that a disturbance of the peace was a likely reaction” to the flag burning (at 2542), the Court held that Johnson’s action was protected by the First Amendment. In spite of this, Justice Rehnquist dissented and claimed that under the circumstances the flag burning made a breach of the peace “probable.” If that were true, then Rehnquist

must admit that what actually happened was quite *improbable*. But given the description of the events surrounding the flag burning, I think it would be hard to maintain that what actually happened was improbable.

<sup>82</sup> For citation of numerous relevant cases, see Freedman 1996, 916.

<sup>83</sup> I fully realize the danger of this truth. Justice Sanford said in 1925 that "[r]easonably limited, [the freedom of speech] is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic" (*Gitlow v. People of the State of New York* at 667). This was in a case where the Supreme Court in effect gave Congress the power to stamp out any "revolutionary spark" that, in its judgment, might at some point in the future flare up into a "conflagration." I consider this a misapplication of the truth that words can cause harm. But the fact that a truth can be dangerously misapplied is not a sufficient reason for refusing to acknowledge that it is true. Without reasonable limits, the freedom of speech could destroy our judicial system altogether by protecting perjury; it could destroy our banking system by protecting bank robbery accomplished by means of speech or a note.

<sup>84</sup> Schauer (1980) argues that communications leading to direct sexual excitement "are not sufficiently intellectual in content to come within the scope of the underlying principles of freedom of speech" (608). I disagree because I think that noncognitive stimulation is a central function of speech, especially of political speeches. Political candidates need not only to inform, but also to inspire and motivate. Freedman (1996, 916–17) has part of a good reply to Schauer, but he emphasizes artistic expression. What Schauer and Freedman both overlook is that noncognitive elements of speech can be significant evidence both of the inciting nature of the speech and of the intent of the speaker to incite specific behavior, which is how I use the "cognitive versus noncognitive" distinction. Chevigny (1989) points to difficulties in this distinction. Certainly there are philosophically interesting and important puzzles about cognition and about the apparent distinction between cognitive and noncognitive elements of expression, but I fail to see how those academic puzzles render the distinction legally unusable. The distinction between speech that "makes you think" and speech that "inflames the passions" is a feature of common experience, and as such is something we can expect a fair jury to rely upon.

<sup>85</sup> Hence the claim that material *M* incited person *P* to commit crime *C* is very different from the claim that *P* imitated *M* by committing *C*. The former does and the latter does not attribute significant causal power and responsibility to *M*. Compare *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036 (1982). In this case, the parents of Nicholas DeFilippo sued NBC for showing a fake hanging on "The Tonight Show," which Nicholas imitated, causing his own death. They lost their initial suit in Superior Court and appealed. Judge Murray affirmed the lower court's decision, partly on the grounds that it was unreasonable to think that the stunt was performed in an inciting way. It was clearly presented as entertainment for the viewing audience and was in no way being recommended as an "audience-participation" stunt. In fact, Carson and his guest emphasized how dangerous the stunt was. It is hard to see how the stunt could be genuinely inciting if it was presented in such a way as to repel people from imitating it. Similarly, any lawsuit against pornographers for publishing inciting material could not rest simply on a claim that the rapist imitated what he saw in pornography. If we censored anything whose imitation was dangerous, then we would have to censor the Bible, for example, since it describes many horrible crimes.

<sup>86</sup> In some ways, the *Brandenburg* incitement test seems to revive the distinction Judge Hand drew between words as the "keys of persuasion" and as "the triggers of action" in *Masses Publishing Co. v. Patten*, 244 Fed. 535 (1917). See Gunther 1975.

<sup>87</sup> I draw this standard from two cases involving *Soldier of Fortune Magazine (SOF)*. In *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (1989), Marjorie Eimann sued SOF for its alleged involvement in the murder of her daughter. The jury decided in her favor on the grounds that the publication in question "reasonably could be interpreted as an offer to engage in illegal activity." The conviction was overturned on the ground that this standard puts too great a burden on publishers. Before publishing anything, a publisher would have to discover all the reasonable interpretations of a



potential publication before putting it out. The chilling effect on protected speech would be enormous.

In *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (1992), however, SOF was held to a much more stringent standard: the publication must on its face contain a clearly identifiable unreasonable risk of harm to the public (at 1116). This is a much more stringent standard. It does not require publishers to canvass all reasonable interpretations of an expressive work. If a work is truly ambiguous, then it is not a proper candidate for a lawsuit. It is only when it "on its face contains a clearly identifiable unreasonable risk of harm to the public" that it poses a problem. This holds publishers to no greater standard than common sense.

<sup>88</sup> There is, to my mind, a striking asymmetry between sexual incitement and incitement based on greed or anger. The latter incite by crossing the line from mere advocacy to incitement but the former has trouble crossing the line in the other direction. Sexually stimulating material is often nothing except incitement (to masturbation at least), and it is notoriously difficult to pack in any other content without dousing the flames of arousal. The more advocacy, the less stimulation; and the less stimulation, the less profit. See Schauer 1982, 181–89.

<sup>89</sup> I first saw this film in a theater filled with both men and women, and when Louise shot Thelma's attacker, both men and women cheered.

<sup>90</sup> *American Booksellers Association v. Hudnut* at 328.

<sup>91</sup> See MacKinnon 1993, 95.

<sup>92</sup> Plato uses *biazō* for "rape" at *Laws* 874c, which emphasizes the element of "force" (i.e., in Greek, *bia*), so "biazography" could work. If one is not bothered by Latin-Greek hybrids, the more euphonious "raptography" would work as well. I prefer *tapeinoō* since it emphasizes the arrogance of wanton disregard for the worth of another human being (see, for example, its use in the Septuagint at *Genesis* 34:2).

<sup>93</sup> Of course he need not do it in precisely the way envisioned by the inciting material. Just as with negligence, you can be responsible for injuries even if you could not have foreseen the exact form they would take or the exact way in which they occurred (see Courtade et al. 1989, 481), and just as NHG can be responsible for Mr. Loeser's injuries even if it could not have foreseen exactly which injuries he would sustain and who would cause them, so also when you incite others to act you can be responsible for the injuries resulting from the incited actions even if you could not have foreseen which individuals would be incited (e.g., which members of the crowd would begin smashing windows) or exactly what form their incited behavior would take (e.g., if they would smash windows with bricks, rocks, or trash cans).

<sup>94</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 at 45. Along with the "strict scrutiny" test is the requirement that there be substantial evidence that the means used to serve the state interest will actually be effective (see *Eclipse Enterprises, Inc., v. Gulotta*, 134 F.3d 63 (1997) at 67). It is just this sort of requirement that Dworkin assumes in his argument against antipornography legislation (see Dworkin 1991 at 169–70). He argues that restricting pornography will not substantially curb the social problem of the sexual abuse of women. Depending upon how one defines "pornography," I am inclined to agree with Dworkin on this point. However, restricting incitement to tax evasion probably won't substantially curb the social problem of people filing fraudulent tax returns either. Anti-incitement laws are designed to prevent a specific kind of problem (i.e., incitement to illegal action), not to prevent a specific kind of consequence (e.g., filing fraudulent tax returns). While anti-tapeinography laws may not significantly curb sexual assault, they will directly address a specific problem: incitement to sexual assault.

<sup>95</sup> *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 (1992) at 2545.

<sup>96</sup> See MacKinnon 1993, 21.

<sup>97</sup> Compare Easton 1994, 92–93.

<sup>98</sup> Hence I agree with the argument of Wertheimer (1994) that "those who rely upon and value language are entrusted with the responsibility to use it as speech" (851).

<sup>99</sup> Concurring opinion in *Noto v. U.S.* at 1523.



<sup>100</sup>In addition to the worry of differential application, this also raises the slippery slope worry that Schauer (1985) calls "Limited Comprehension" (373–76). Although legal theorists who read this article may understand very well what is covered by my definition of "tapeinography," criminal legislation would be enforced by nontheorists who may be unclear on the concept. This could cause a significant "chilling effect" on speech, even if the mistaken arrests fail to result in convictions. But of course every law is susceptible to the same sort of mistake. I don't see any special problem with my definition of "tapeinography" that would make it more susceptible to misinterpretation by police officers than many other laws we trust them to enforce.

<sup>101</sup>Easton (1994) summarizes more of the considerations at 115–21.

<sup>102</sup>*Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (1997) at 251.

<sup>103</sup>Weingarten (1984) and Burke (1996) both argue for standards less than the very strict incitement standard set by *Brandenburg*. Weingarten argues for a negligence standard, and Burke argues for a "reckless instigation" standard (135). Because it is clear that speech of many different kinds can cause great harm, I am inclined to think that the law ought to require of us some degree of circumspection when we express ourselves. Nevertheless, I am also inclined to think that standards of liability for speech must be significantly higher than those normally used in tort law. An acceptable middle ground between the incitement standard and the negligence standard might be to hold someone liable for speech that, regardless of the speaker's actual intent, a reasonably prudent, informed, and circumspect person would know is likely to incite another to act illegally. The likely audience of the speech in question will be crucial. Vocal speech will reach only those within earshot, but videotapes sent out through the mail to any adult will likely get into the hands of people with less than the ordinary standard of care for the welfare of others.

<sup>104</sup>*Rice v. Paladin Enterprises, Inc.*, at 247.

<sup>105</sup>For a good discussion of the concept of "low value speech" see Greenawalt 1995, 102–13. Sunstein (1986) argues that "pornography" is "low value speech" and so antipornography legislation should not be subject to strict First Amendment scrutiny.

<sup>106</sup>Compare *Weirum v. R.K.O. General, Inc.*, 539 P.2d 36 (1975). In this case, a radio station sponsored a contest where listeners were encouraged to be the first to find "the real Don Steele," a disk jockey, and win a prize. Don Steele would announce his location over the radio, encouraging listeners to drive quickly to his location. Some listeners caused a car accident in which there was a fatality. The wife and children of the deceased sued R.K.O. and won even without proving an intent to cause a fatality on the part of the radio station. According to Judge Mosk, "The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent" (at 40). This could apply to tapeinography in that even if it does not actually incite rape, nevertheless it is "foreseeable" that some men will rape when exposed to tapeinography under certain circumstances (e.g., when they are in the privacy of their own homes and they believe they cannot successfully be prosecuted for raping their own wives; see MacKinnon's citations in the case of Trish Crawford, MacKinnon 1993, 114 nn.3–4). In 1995, 46 percent of sexual assaults occurred between relatives or people well known to each other, and 43 percent of sexual assaults happened at or near the victim's home (U.S. Bureau of Justice statistics; see U.S. Bureau of the Census 1997, Table 326, p. 208).

In *Olivia v. National Broadcasting Co., Inc.*, 178 Cal.Rptr. 888 (1982), Judge Christian explicitly interpreted and applied Mosk's decision, specifically rejecting the possibility of imposing liability "on a simple negligence theory" (at 892) and requiring a showing of actual incitement.

<sup>107</sup>Balkin (1990) has argued that "[r]adical feminist arguments against pornography take a much more communalist attitude toward expressive conduct than many (male) lawyers are accustomed to" (261). Rather than applying the strict "individualist" attitude toward speech, holding the speaker responsible for only a very narrow range of effects caused by the speech, Balkin argues that "[r]adical feminists" want to use the more "communalist" standard that is typical of negligence cases, such as product liability. One of Balkin's main points is to show that the kinds of arguments we give

in holding a defendant or a plaintiff responsible for certain injuries reveal our underlying "ideology." In this article, I am not arguing for a loosening of the standards for holding tapeinography responsible for the injuries it incites people to cause; rather, I am arguing that the ordinary standards of incitement can be applied to tapeinography.

<sup>108</sup> I base this imaginary example on material in Itzin 1992, 34, and in MacKinnon 1985, 43–50.

<sup>109</sup> I am relying upon Judge Luttig's discussion of intent in *Rice v. Paladin Enterprises, Inc.*, at 253–55.

<sup>110</sup> In *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (1989), Judge O'Connor found that the film *The Warriors* could not count as incitement to violent action on the grounds that "it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of the viewers" (at 1071–72). If this is intended to require *explicit* exhortation (etc.), then it is too strong a standard for incitement. It is quite possible to exhort specific and imminent action without explicitly using the words, "I exhort you to do it now." From the espionage cases in 1919 to the incitement to tax evasion cases in the 1980s, guilty inciters have not been held to such a standard. Consider, for example, the conviction of Jerry Rubin for incitement to riot because he waved his arm and shouted "Look at these motherfucking pigs . . . standing over here. . . . They have to be standing in the park protecting the park, and the park belongs to the people. Let's get these fuckers out of here" (*U.S. v. Dellinger*, 472 F.2d 340 (1972) at 405). Rubin never *explicitly* exhorted, entreated, advocated, . . . commanded or ordered anyone to throw anything at the police in the immediate or remote future. But this didn't fool the court at all. Given the context, "Let's get these fuckers out of here" is not a suggestion to escort the police elsewhere. The court interpreted Rubin's words and deeds as incitement, and that interpretation was not unreasonable.

Compare *Herceg v. Hustler Magazine Inc.*, in which Judge Rubin found that the article "Orgasm of Death" did not incite Troy Herceg to try autoerotic asphyxiation (at 1023): "Although it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists, the detail in 'Orgasm of Death' is not enough to permit breach of the first amendment. The manner of engaging in autoerotic asphyxiation apparently is not complicated. To understand what the term means is to know roughly how to accomplish it. Furthermore, the article is laden with detail about all facets of the practice, including the physiology of how it produces a threat to life and the seriousness of the danger of harm." Rubin gives two reasons in here, and both are right on target. First, the amount of detail given on how to accomplish something does not necessarily bear on whether one's description is inciting. If more detail entailed more incitement, then medical textbooks would count as incitement to all sorts of gruesome activities. Second, if the article goes to significant lengths to make the practice undesirable, repellent, or offensive in some way (e.g., by underscoring the horrible dangers one risks in attempting what is described), then the description cannot fairly be read as an incitement to the practice in question. This leaves open the possibility that material that goes to significant lengths to make an action desirable or attractive could count as incitement to that action, even if it nowhere explicitly exhorts (etc.) specific persons to specific action in the immediate future.

<sup>111</sup> *Herceg v. Hustler Magazine Inc.* at 1023.

<sup>112</sup> *U.S. v. Dellinger* at 405. See note 110.

<sup>113</sup> See, for example, *State v. Natzke*, 544 P.2d 1121 (1976) at 1123, and MacKinnon 1985, 56–57 and 66–67.

<sup>114</sup> *N.A.A.C.P. v. Claiborne Hardware Co.* at 3434.

<sup>115</sup> If a woman is impregnated as a result of a rape incited by a publisher and she decides to keep the child, she may very well ask for eighteen years and nine months' worth of child support from the publisher.

<sup>116</sup> Because of this, any legal action against tapeinography might have a substantial "chilling effect" on a tremendous amount of expression. Some authors write as if the

amount of speech chilled is what is of vital importance. I disagree. The central question should not be how much speech is chilled, but which speech is chilled. "Too much" speech is chilled only when speech that should be protected is chilled. If there is no substantial worry about chilling protected speech when it comes to other incitement laws, I see no reason to worry about it in the case of incitement to sexual assault.

<sup>117</sup> Although it is difficult to draw lines here, I am inclined to think that tapeinography should be placed in Greenawalt's (1989) "public nonideological" category (270–71). Although tapeinographic videos and magazines are clearly intended to be used in the privacy of one's own home, they are marketed in such a way "as to become known to a wide audience" (271). Further, although some tapeinography may include some message about the "broad benefit" to "human life and social change" (272) that will follow from raping women, the manner in which the message is conveyed is clearly and on its face directed to promising great pleasure in committing the crime. If one accepts Greenawalt's general argument in this section, then legal action against tapeinography may very well call for something substantially weaker than the "stringent probability standard of reasonable likelihood that speech will produce the crime" (271).

<sup>118</sup> See Malamuth and Check 1980; Malamuth, Haber, and Feschbach 1980; Malamuth 1981; and Tieger 1981.

<sup>119</sup> A great many slippery slope arguments against feminist antipornography legislation are clearly fallacious since they use emotionally charged words instead of evidence in order to support the claim that such legislation will inevitably lead to unacceptable infringements on the freedom of speech. See Walton 1992, 167–70. Nevertheless, there are slippery slope arguments against such legislation that are not clearly fallacious.

<sup>120</sup> *Rice v. Paladin Enterprises, Inc.*, at 265.

<sup>121</sup> The analogy between the First and Second Amendments is for purposes of illustration. The freedom of speech guaranteed by the First Amendment clearly applies to citizens individually, but the right to bear arms guaranteed by the Second Amendment does not (contrary to what the NRA argues) apply to citizens individually.

<sup>122</sup> Here I am using Walton's (1992) first strategy for responding to slippery slope arguments (260). I simply reject the main claim of the slippery slope: I don't think the negative consequences will follow.

<sup>123</sup> Here I am using Walton's (1992) fourth strategy for responding to slippery slope arguments (260). I think the positive consequences of anti-tapeinographic legal action are well worth any restrictions they place on expression. Although I think that the value of great art outweighs the harm of any "offense" it causes in those whose sensibilities are easily offended, the matter is very different when it comes to inciting sexual assault. Great artists should have no more latitude than the rest of us when it comes to inciting crime. Great poets and/or performance artists, for example, should not be permitted to rob banks simply because they do so in very creative and artistic ways.

<sup>124</sup> Here I am using Walton's (1992) second strategy for responding to slippery slope arguments (260). The slippery slope rests on a prediction of the future, and all such predictions are uncertain. Unless there is substantial evidence that the negative results really will follow, the slippery slope worry is an empty fear.

<sup>125</sup> Perhaps this slippery slope is too bald to be persuasive. I rely upon the case of *Hit Man* to stir the reader's imagination. If the *New York Times* (one of the *amici* on behalf of Paladin) can defend *Hit Man* as a legitimate exercise of the freedom of speech, how would it deal with a "special promotion" in which a coupon for a free pistol, ammunition, and a silencer were given away with every purchase of the book? What if the book were sold in a box set together with a pistol, a silencer, and ammunition (abiding by any relevant gun control laws) as a "Starter Kit for Murderers"? Compare a similar thought experiment by Schauer (1990, 164ff). Given the lengths corporations go to in order to market their products, and given the opportunity to profit from increased sales, and perhaps also from subsidies by gun makers, I think it highly likely that something like this would inevitably happen if books like *Hit Man* were protected by the First Amendment; and given their arguments, I don't see how *amici*

like the *New York Times* could halt this slippery slope of speech from sliding all the way down to protecting obvious aiding and abetting murder.

<sup>126</sup> See Schauer 1985 at 381 and Walton 1992 at 261–62.

<sup>127</sup> Here I am using Walton's (1992) third strategy for responding to slippery slope arguments (260). I am not arguing for legislation that could reasonably be thought to lead to the negative consequences. For example, I am not arguing for antipornography legislation, or legislation against all sexually explicit expression that puts women in a bad light. I am arguing only for the tried and true category of incitement.

<sup>128</sup> Here I am using Walton's (1992) fourth strategy for responding to slippery slope arguments (260). The positive consequences of repairing the damage of sexual assault and of defending the equal status of women are well worth the minimal negative consequences of anti-tapeinographic legal action.

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